# Progressive Supersession: Arizona's Innovative Use of State Prosecutorial Power

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## INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned the constitutional right to abortion established in *Roe v. Wade* and returned the power to regulate abortion to the states.[1] While some states took steps to protect abortion rights following *Dobbs*, over half of the U.S. states restricted access to abortion.[2] Prosecutors in several states began navigating an uncertain landscape of new or ambiguous abortion-related criminal laws.[3]

Arizona had several conflicting statutes and injunctions related to abortion in place when *Dobbs* was decided.[4] Under *Roe*, the ambiguity created by

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1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 259 (2022) ("[W]e thus return the power to weigh [abortion] arguments to the people and their elected representatives.") (alterations in original). *See generally* Roe v. Wade, 410 U.S. 113 (1973) (establishing a constitutional right to abortion).

2. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/ZR8S-SEJY]; *see also Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies/texas/abortion-policies [https://perma.cc/DXB2-W7KN].

3. *See* Jessica Kutz, *Prosecutor Explains What Preparing for a Future of Post*-Roe *Abortion Cases Might Look Like*, 19TH NEWS (July 12, 2022, 1:55 PM), https://19thnews.org/2022/07/prosecutor-abortion-cases-legal-justice-system [https://perma.cc/JXG5-4ECW] ("Many prosecutors are saying they'll use their prosecutorial discretion to avoid charging abortion cases, but [Jackson County Missouri prosecuting attorney] Peters Baker said it isn't that easy."); *see also* Joseph Gedeon, *Blue-City Prosecutors in Red States Vow Not to Press Charges over Abortions*, POLITICO (June 26, 2022, 7:00 AM), https://www.politico.com/news/2022/06/26/blue-city-prosecutors-in-red-states-vow-not-to-press-charges-over-abortions-00042415 [https://perma.cc/ZC34-N7GB].

4. Isaacson v. Brnovich, 610 F. Supp. 3d 1243, 1254 (D. Ariz. 2022); *see also* JENNIFER L. PIATT, ARIZONA ABORTION LAWS & POLICIES POST-DOBBS 2–3 (2023), https://law.asu.edu/sites/default/files/2023-09/CPHLP_Memo-Arizona_Post-Dobbs.pdf [https://perma.cc/34V6-7TA4].

these statutes had little practical effect.[5] In the post-*Roe* era, however, this uncertainty turned the Grand Canyon State into one of the nation's most contentious abortion policy battlegrounds.[6]

This upheaval in abortion rights, in Arizona and nationwide, has occurred at a time when clashes between local and state governments are becoming more common.[7] This clash has been especially notable in criminal justice policy. Animosity has grown between state officials and local "progressive prosecutors" who want to reform criminal justice practices.[8] In pursuit of this goal, many progressive prosecutors have enacted blanket declination policies ("blanket DPs") to shrink the footprint of the criminal justice system.[9] These blanket DPs establish a prosecutor's intent not to charge certain categories of crimes, such as marijuana possession or disorderly conduct.[10] Several state officials, unhappy with these blanket DPs, have used their supersession power to overrule local prosecutors or intervene in their cases.[11] Although state officials have rarely used supersession power in the past, they have invoked it with increasing frequency to challenge the practices of progressive prosecutors.[12] Because of this trend, supersession has been described as an existential threat to criminal justice reform.[13]

In Arizona, however, supersession and progressive prosecution have become strange bedfellows.[14] In June 2023, a year after *Dobbs* was decided,

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5. *See, e.g.*, Nelson v. Planned Parenthood Ctr. Tucson, Inc., 505 P.2d 580, 590 (Ariz. Ct. App. 1973) (opinion on reh'g) (declaring Arizona's territorial ban unconstitutional under *Roe*).

6. *See* PIATT, *supra* note 4, at 1.

7. *See, e.g.*, JORGE CAMACHO ET AL., LOC. SOLS. SUPPORT CTR., PREEMPTING PROGRESS: STATES TAKE AIM AT LOCAL PROSECUTORS 3 (2023), https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/63cf18da2a1300367cfec952/1674516705430/Prosecutorial Discretion2023.pdf [https://perma.cc/G5MY-9YAB] (discussing several filed bills that would preempt local prosecutorial discretion); Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1673–80 (documenting efforts to circumvent, sanction, and takeover local prosecutorial power); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018) (discussing how "hyper preemption" statutes are discouraging local governments from exercising policy authority).

8. *See infra* Part III.

9. *See infra* Section III.B.

10. *See infra* Section III.B.

11. *See infra* Part II and Section III.C.

12. *See infra* Part II and Section III.C.

13. John Pfaff, *A Potent Weapon for Red States to Undermine Reform Prosecutors*, SLATE (Feb. 22, 2024, 2:59 PM), https://slate.com/news-and-politics/2024/02/gop-state-lawmakers-undermining-reform-prosecutors-blue-cities.html [https://perma.cc/HWF4-APDR] ("Preemption poses a serious, if not existential, threat to reform, especially for blue cities in red states."); CAMACHO ET AL., *supra* note 7, at 21 ("This new trend of state preemption of local prosecutorial discretion presents a grave threat to criminal justice reform, civil rights, and local democracy.").

14. *See infra* Parts I, IV.

Arizona Governor Katie Hobbs issued Executive Order 2023-11, entitled "Protecting Reproductive Freedom and Healthcare in Arizona."[15] In the executive order, Governor Hobbs invoked her supersession power under Arizona Revised Statutes ("A.R.S.") § 41-193(A)(5) and directed Attorney General ("AG") Kris Mayes to "assume all duties" over any abortion-related prosecutions in Arizona.[16] AG Mayes then announced that Arizonans could seek abortions and reproductive healthcare "without interference or fear of criminal prosecution."[17] This nonprosecution arrangement, which this Comment calls the "Hobbs-Mayes Policy" (or simply the "Policy"), has been praised by some as necessary to protect Arizonans' rights and to provide stability in a period of uncertainty.[18] Opponents of the Policy, however, have argued that the Governor exceeded her authority by stripping local, elected prosecutors of their power to enforce the law in their counties.[19]

The Hobbs-Mayes Policy is a prosecutorial innovation that this Comment labels "progressive supersession." The Policy appears to be one of the first supersession actions in the nation to promote left-leaning policies. While supersession has historically hindered progressive prosecutors, the Hobbs-Mayes Policy demonstrates that supersession can be reimagined as a tool to achieve progressive prosecution goals. This Comment draws an analogy between blanket DPs used by local prosecutors and the Hobbs-Mayes Policy to demonstrate how the Policy combines statutory supersession power with progressive prosecution strategies.

Progressive supersession may amplify the benefits of using blanket DPs, but it may also amplify its flaws. This Comment explores this tension and examines whether this tradeoff weighs in favor of using progressive supersession and, if so, under what circumstances. Ultimately, this Comment concludes that the circumstances surrounding the Hobbs-Mayes Policy made supersession appropriate. It cautions, however, that using supersession power broadly as a policymaking tool generates a unique set of challenges.

In Part I, this Comment describes the Hobbs-Mayes Policy, its reception, and its evolving role amidst changes in Arizona abortion law.[20] Part II

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15. Ariz. Exec. Order No. 2023-11 (June 22, 2023), https://azgovernor.gov/sites/default/files/executive_order_2023_11.pdf [https://perma.cc/S9YY-ZX5C].

16. *See infra* Part I.

17. Press Release, Ariz. Att'y Gen. Kris Mayes, Attorney General Mayes Statement on Anniversary of Overturning Roe v. Wade (June 23, 2023), https://www.azag.gov/press-release/attorney-general-mayes-statement-anniversary-overturning-roe-v-wade [https://perma.cc/TR4D-F23S].

18. *See infra* Section I.B.

19. *See infra* Section I.B.

20. *See infra* Part I.

explains the legal mechanism behind the Policy—state supersession power—and explores its little-known contours.[21] Part III provides a brief overview of the progressive prosecution movement and one of its most controversial practices: blanket DPs.[22] In Part IV, this Comment returns to the Hobbs-Mayes Policy to explore the unique way it combines supersession and progressive prosecution.[23] This Part also discusses the normative value of using supersession power to enact statewide blanket DPs and when this combination might be most appropriate. [24]

## I. THE HOBBS-MAYES POLICY

After *Dobbs*, Arizona had some of the most ambiguous abortion laws in the country.[25] Until 2024, Arizona had two statutes regulating abortion that appeared to conflict. A.R.S. § 13-3603, which remained in force until September 2024, contained a near-total ban on abortion originating from 1864, before Arizona became a state.[26] This territorial ban made it a criminal offense to intentionally "procure the miscarriage" of a pregnant woman unless necessary to save the woman's life.[27] The Arizona Court of Appeals affirmed an injunction preventing enforcement of the law after *Roe* was decided,[28] but the law was never repealed. In 2022, the Arizona Legislature passed Senate Bill ("S.B.") 1164, criminalizing abortions after fifteen weeks

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21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part IV.

25. *See* PIATT, *supra* note 4; *see also* Isaacson v. Brnovich, 610 F. Supp. 3d 1243, 1254 (D. Ariz. 2022) ("At present, the precise legal status of abortion in Arizona is murky."). For more information on abortions performed in Arizona pre-*Dobbs*, see ARIZ. DEP'T OF HEALTH SERVS., ABORTIONS IN ARIZONA: 2021 ABORTION REPORT 17 (Dec. 31, 2022), https://www.azdhs.gov/documents/preparedness/public-health-statistics/abortions/2021-arizona-abortion-report.pdf [https://perma.cc/WUB5-LV8V] (noting that 89.7% of abortions performed in Arizona in 2021 were performed at thirteen weeks or earlier).

26. *See* Anna Betts & Colbi Edmonds, *What We Know About Arizona's Abortion Battle*, N.Y. TIMES (May 3, 2024), https://www.nytimes.com/article/arizona-abortion-ban.html; *see also Important Information About Abortion Access in Arizona*, ARIZ. ATT'Y GEN. KRIS MAYES, https://www.azag.gov/issues/reproductive-rights [https://perma.cc/3B5H-VBN2] (explaining that the full repeal of Arizona's 1864 abortion law would take effect on September 14, 2024).

27. FIRST LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA, HOWELL CODE ch. 10, § 45 (1864), https://azmemory.azlibrary.gov/nodes/view/38227 [https://perma.cc/VLK4-WWQG] (codified as amended at ARIZ. REV. STAT. ANN. § 13-3603, *repealed by* 2024 Ariz. Legis. Serv. ch. 181 (West)).

28. Nelson v. Planned Parenthood Ctr. of Tucson, Inc., 505 P.2d 580, 590 (Ariz. Ct. App. 1973) (opinion on reh'g).

with exceptions for a "medical emergency."[29] This bill explicitly stated, however, that it did not repeal Arizona's territorial abortion ban or create a state right to abortion.[30]

Legal challenges attempting to harmonize the territorial ban and the fifteen-week restriction began after *Dobbs*.[31] While the Arizona courts attempted to reconcile these statutes, Governor Hobbs's administration explored legal mechanisms that might prevent the criminalization of certain abortion-related offenses.[32] This Part discusses the Hobbs-Mayes abortion nonprosecution policy, which draws on both supersession power[33] and progressive prosecution strategies.[34]

### *A. Hobbs's Executive Order & Mayes's Response*

On June 22, 2023, almost a year after the *Dobbs* decision, Arizona Governor Katie Hobbs signed Executive Order 2023-11 (the "EO"), titled "Protecting Reproductive Freedom and Healthcare in Arizona."[35] In several recitals at the beginning of the EO, Governor Hobbs affirmed her commitment to "protecting access to reproductive healthcare" and mitigating "uncertainty about the applicable law and whether and under what circumstances criminal charges could be brought."[36] Governor Hobbs also emphasized the importance of addressing abortion policy at the state level to diminish uncertainty.[37] The EO explained that "the State has an interest in ensuring that abortion laws are applied equally" and that "the *Dobbs* decision and remaining questions on the application of Arizona's abortion laws to specific cases could lead county attorneys across the State to make disparate decisions on whether and how to criminally prosecute the same, or similar

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29. S.B. 1164, 55th Leg., 2d Reg. Sess. (2022) (codified at ARIZ. REV. STAT. ANN. §§ 36-2321 to -2326 (2024)); *see also* The Meaning of "Medical Emergency" Under A.R.S. § 36-2321(7), Ariz. Att'y Gen. Op. No. I24-009 (2024), https://www.azag.gov/opinions/i24-009-r24-011 [https://perma.cc/29WY-6NYS].

30. *See* S.B. 1164 § 2 (describing construction of A.R.S. § 36-2326).

31. *See, e.g.*, Planned Parenthood Ariz., Inc. v. Brnovich, 524 P.3d 262, 266 (Ariz. Ct. App. 2022).

32. *See* Ray Stern, *Arizona Gov. Katie Hobbs Issues Executive Order to Limit Prosecutions Related to Abortions*, AZ CENTRAL (June 23, 2023, 4:41 PM), https://www.azcentral.com/story/news/politics/arizona/2023/06/23/arizona-gov-hobbs-signs-executive-order-to-limit-abortion-prosecution/70348934007 [https://perma.cc/EW4A-B342].

33. *See infra* Part II.

34. *See infra* Part III.

35. Ariz. Exec. Order No. 2023-11, at 1 (June 22, 2023).

36. *Id.* at 1.

37. *Id.* at 2.

conduct relating to abortion care."[38] The EO asserted that "centralizing control of prosecution relating to the provision of abortion care in the Attorney General—the State's chief law enforcement officer—will provide uniformity and ensure equal and consistent application of the law across the State."[39]

With these principles in mind, the EO announced four action items.[40] First, and most relevant to this Comment, Hobbs centralized all abortion-related prosecutions in AG Mayes's office:

> To the extent permissible under Arizona law, the Attorney General shall assume all duties with regard to any criminal prosecution . . . that is pending or brought in the future by the county attorney of any county in this State for violation of any State law restricting or prohibiting abortion care including, without limitation, A.R.S. § 13-3603 and provisions in Title 36, Chapter 23.[41]

The EO also declared that Arizona would not cooperate with investigations and extradition requests related to reproductive healthcare and created a "Governor's Advisory Council on Protecting Reproductive Freedom."[42]

To establish the legal basis for this EO, Hobbs cited several provisions of A.R.S. § 41-193(A),[43] which describes the duties of the Arizona AG.[44] Most relevant to this Comment is subsection (A)(5), Arizona's supersession statute. This provision states that, "[u]nless otherwise provided by law the [AG] shall . . . [a]t the direction of the governor, or if deemed necessary, assist the county attorney of any county in the discharge of the county attorney's duties."[45] Although the EO does not state this explicitly, the use of this provision presumes that centralizing abortion-related prosecutions in the AG's office will "assist" local prosecutors in carrying out their duties.[46]

Governor Hobbs also relied on § 41-193(A)(2), which states that the AG may "prosecute and defend any proceeding in a state court other than the supreme court in which this state or an officer of this state is a party or has an interest" under certain circumstances.[47] In theory, AG Mayes could rely on this provision to initiate prosecutions related to abortion offenses if the

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38. *Id.*
39. *Id.*
40. *See id.* at 2–3.
41. *Id.* at 2.
42. *Id.* at 2–3.
43. *Id.* at 2.
44. ARIZ. REV. STAT. ANN. § 41-193(A) (2024).
45. § 41-193(A)(5).
46. *See infra* Section II.C.
47. § 41-193(A)(2).

state "has an interest" in doing so, but this provision might not permit AG Mayes to block local prosecutors from filing charges.[48] Because Governor Hobbs intended that AG Mayes would "assume all duties" related to abortion prosecutions,[49] this Comment presumes that the legal authority underpinning the EO flows principally from A.R.S. § 41-193(A)(5), Arizona's supersession statute, discussed in the next Part.

The EO went into effect immediately.[50] The day after the EO was announced, AG Mayes issued a press release announcing that "Arizonans can seek abortions and access reproductive health care—without interference or fear of criminal prosecution."[51] This statement suggested that, in line with the goals of the Hobbs Administration, AG Mayes would not prosecute certain abortion-related offenses.[52]

### *B. Response to the Hobbs-Mayes Policy*

Hobbs's EO and Mayes's abortion nonprosecution policy made national headlines.[53] Abortion advocates such as Planned Parenthood lauded the EO as "critical" to "help ease the fear and uncertainty that swept through Arizona in the year since [*Roe*] was overturned, and protect all those seeking and providing necessary healthcare."[54] Arizona's Solicitor General Josh Bendor noted that, even if the EO is a prophylactic measure, it provided much-needed consistency while cases defining abortion rights in Arizona were pending.[55]

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48. *See* State *ex rel.* Brnovich v. Ariz. Bd. of Regents, 476 P.3d 307, 312 (Ariz. 2020) (holding that the AG's authority to "prosecute" cases under § 41-193(A)(2) includes the power to initiate litigation).

49. Ariz. Exec. Order No. 2023-11, at 2 (June 22, 2023).

50. *Id.* at 3.

51. Press Release, Ariz. Att'y Gen. Kris Mayes, *supra* note 17.

52. *Id.* As discussed in Section I.C, *infra*, AG Mayes later promised not to prosecute abortion-related offenses more explicitly. *See* Press Release, Ariz. Att'y Gen. Kris Mayes, Attorney General Mayes Statement on Planned Parenthood of AZ v. Mayes (Apr. 9, 2024), https://www.azag.gov/press-release/attorney-general-mayes-statement-planned-parenthood-az-v-mayes [https://perma.cc/R3M7-JS8B] ("And let me be completely clear, as long as I am Attorney General, no woman or doctor will be prosecuted under this draconian law in this state.").

53. *See, e.g.*, Daniel Trotta, *Arizona Governor Issues Order to Protect Abortion Rights*, REUTERS (June 23, 2023, 5:44 PM), https://www.reuters.com/world/us/arizona-governor-issues-order-protect-abortion-rights-2023-06-24 [https://perma.cc/E26J-5WF6].

54. Planned Parenthood Advocates of Arizona (@PPAZAction), X (June 23, 2023, 11:30 AM), https://x.com/ppazaction/status/1672311211231416321 [https://perma.cc/U329-LKAH].

55. Shannon Levitt, *Jewish Solicitor General Sees 'Consistency' in Governor's Recent Abortion Order*, JEWISH NEWS (July 14, 2023), https://www.jewishaz.com/community/jewish-

Several Arizona politicians and organizations criticized the EO as an executive branch overreach.[56] Notably, twelve of Arizona's fifteen county prosecutors signed a letter asking Hobbs to rescind the EO, calling it "an unnecessary and unjustified impingement on the duties and obligations of elected county attorneys in Arizona."[57] The letter emphasized that "[s]ince statehood, it has been status quo in Arizona that the duty and discretion to conduct criminal prosecutions for public offenses rests with county attorneys unless a statute specifically provides otherwise."[58] One of the attorneys who signed the letter, Pinal County Attorney Kent Volkmer, stated in an interview that the "governor came in and, against the explicit will of our state Legislature, attempted to essentially strip me of my authority to prosecute."[59] Volkmer also stated, "I've been elected twice by my constituents and by the people in Pinal County to use my judgment and use my discernment in prosecuting cases. Essentially the governor said, 'Yeah, you can't be trusted.'"[60] At least one county attorney expressed a desire to enforce Arizona's 1864 abortion law.[61]

Some members of the Arizona Legislature also criticized the EO. Ben Toma, Speaker of the Arizona House of Representatives, stated that "this order shows disrespect and contempt for the judiciary . . . . The governor cannot unilaterally divert statutory authority to prosecute criminal cases from Arizona's 15 county attorneys to the attorney general."[62] He said he would be

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solicitor-general-sees-consistency-in-governor-s-recent-abortion-order/article_8942f5c8-2263-11ee-b56d-af75191bdcd7.html [https://perma.cc/6LA7-C6PC].

56. *See* Caitlin Sievers, *The Political Theater of Executive Orders Is Nothing New in Arizona*, ARIZ. MIRROR (July 3, 2023, 9:04 AM), https://azmirror.com/2023/07/03/the-political-theater-of-executive-orders-is-nothing-new-in-arizona [https://perma.cc/E9GS-CX28].

57. Letter from Rachel H. Mitchell, Maricopa Cnty. Att'y, to Katie Hobbs, Ariz. Governor (July 3, 2023) [hereinafter Letter to Katie Hobbs], https://www.maricopacountyattorney.org/DocumentCenter/View/2763/EO-2023-11-Governor-Hobbs-003 [https://perma.cc/NY6P-ZBLD]; *12 County Attorneys Ask Hobbs to Rescind Abortion Executive Order*, KNAU (July 4, 2023, 6:58 AM), https://www.knau.org/knau-and-arizona-news/2023-07-04/12-county-attorneys-ask-hobbs-to-rescind-abortion-executive-order [https://perma.cc/2MVE-7WEK].

58. Letter to Katie Hobbs, *supra* note 57.

59. Elise Catrion Gregg, *Abortion Debate Spurs New Efforts to Restrict Prosecutorial Discretion*, CRONKITE NEWS (Oct. 6, 2023), https://cronkitenews.azpbs.org/2023/10/06/abortion-debate-prosecutorial-discretion-laws-executive-orders [https://perma.cc/F5ZU-GDKJ].

60. *Id.*

61. John Washington, *Arizona Gov. Hobbs and AG Mayes Vow Not to Prosecute Under 1864 Abortion Ban*, ARIZ. LUMINARIA (Apr. 12, 2024), https://azluminaria.org/2024/04/12/arizona-gov-hobbs-and-ag-mayes-vow-not-to-prosecute-under-1864-abortion-ban [https://perma.cc/8JDP-CLRT] (explaining that Yavapai County Attorney Dennis McGrane was a party to the suit to enforce the 1864 abortion law).

62. Trotta, *supra* note 53.

reviewing the EO "to determine its legality."[63] Arizona Senate President Warren Peterson called the EO a "PR stunt" that was "attempting to usurp law enforcement."[64] Susan B. Anthony Pro-Life America stated that Hobbs was "ordering the government to ignore the law."[65] Some of the EO's opponents argued that statutes only allow the AG to "assist" or "aid" county prosecutors, not "strip county attorneys of their clear enforcement authority."[66] To date, however, no formal challenges to the Policy have been brought.[67]

### *C. The Hobbs-Mayes Policy in a Changing Landscape*

The Hobbs-Mayes Policy has remained in place throughout a series of changes in Arizona abortion law. In December 2022, the Arizona Court of Appeals determined that the territorial ban in A.R.S. § 13-3603 and the fifteen-week restriction in S.B. 1164 could be harmonized.[68] Under this interpretation, Arizona physicians could legally provide abortions up to fifteen weeks of pregnancy.[69] Governor Hobbs and AG Mayes promulgated their nonprosecution policy in June 2023, while this Court of Appeals decision was being reviewed by the Arizona Supreme Court.[70]

In April 2024, the Arizona Supreme Court reversed the Court of Appeals, holding that the laws could not be harmonized.[71] The Supreme Court explained that S.B. 1164 "was not a legislative attempt to preserve a right to

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63. Stern, *supra* note 32.

64. *Id.*

65. SBA Pro-Life America (@SBAProLife), X (June 23, 2023, 1:15 PM), https://twitter.com/sbaprolife/status/1672337620163084289 [https://perma.cc/TBJ8-NNRW].

66. Center for AZ Policy (@AZPolicy), X (June 23, 2023, 12:20 PM), https://twitter.com/azpolicy/status/1672323652740841477 [https://perma.cc/ZS97-5DGP] (arguing that the governor "may require the attorney general to aid a county attorney," but "[a]id does not mean supplant or replace").

67. *See* Erika Ryan et al., *Arizona Gov. Hobbs Is Determined to Repeal State's Near Total Abortion Ban*, NPR (Apr. 11, 2024, 5:13 PM), https://www.npr.org/2024/04/11/1244174006/arizona-gov-hobbs-is-determined-to-repeal-states-near-total-abortion-ban [https://perma.cc/7SVW-P5CP].

68. *See* Planned Parenthood Ariz., Inc. v. Brnovich, 524 P.3d 262, 266 (Ariz. Ct. App. 2022).

69. *See id.*; Jack Healy, *Arizona Doctors Cannot Be Prosecuted Under 1864 Abortion Ban, Court Says*, N.Y. TIMES (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/us/arizona-abortion-ban.html.

70. *See supra* Section I.A; *see also* Planned Parenthood v. Mayes, No. CV-23-0005PR, 2023 Ariz. LEXIS 181 (Aug. 22, 2023) (setting the case for oral argument).

71. *See* Planned Parenthood Ariz., Inc. v. Mayes, 545 P.3d 892, 903 (Ariz. 2024).

abortion in Arizona."[72] With no right to abortion under S.B. 1164 or federal law, Arizona's territorial-era statute became enforceable.[73] After this decision, the Arizona Legislature entered a period of intense debate about how it should respond.[74]

Amid this uncertainty, Governor Hobbs and AG Mayes emphasized that their nonprosecution Policy remained in force.[75] Governor Hobbs issued a press release stating, "As long as I am Governor, no Arizonan will be prosecuted by extremist county attorneys for seeking abortion care."[76] AG Mayes echoed this commitment in her own press release.[77] AG Mayes also emphasized in an interview that "there are laws on the books in Arizona and in every state that are not enforced" and that it is "[her] job to make sure that the resources of [her] office are properly utilized and spent."[78]

Less than a month after the Arizona Supreme Court upheld the territorial ban, the state legislature repealed the 1864 statute.[79] But in November 2024, Arizona voters added their voices to the debate by approving Proposition 139,

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72. *Id.* at 901.

73. *Id.* at 903 ("In light of this Opinion, physicians are now on notice that all abortions, except those necessary to save a woman's life, are illegal . . . .").

74. *See* Gloria Rebecca Gomez, *The AZ Senate Has Repealed the 1864 Abortion Ban, After 2 Republicans Join Dems*, ARIZ. MIRROR (May 1, 2024, 1:21 PM), https://azmirror.com/2024/05/01/the-az-senate-has-repealed-the-1864-abortion-ban-after-2-republicans-join-dems [https://perma.cc/XJN7-6EGE] (discussing intense debate in the Arizona Senate about repealing the 1864 law); *Arizona Senate Debates 1864 Abortion Law Repeal*, C-SPAN (May 1, 2024), https://www.c-span.org/video/?535316-1/arizona-senate-debates-1864-abortion-law-repeal.

75. *See, e.g.*, Wayne Schutsky, *Arizona Governor Says Local Prosecutors Can't Bring Charges in Abortion Cases*, KJZZ (Apr. 12, 2024, 3:32 PM), https://www.kjzz.org/2024-04-12/content-1876915-arizona-governor-says-local-prosecutors-cant-bring-charges-abortion-cases [https://perma.cc/CBP5-YA6Y] (statement of Governor Hobbs) ("We did thorough research and I am very, very confident in the legal ground that we stand on in this executive order.").

76. Press Release, Off. of the Ariz. Governor Katie Hobbs, Governor Katie Hobbs Reiterates Protections for Arizonans Seeking Abortion Care Under Executive Order (Apr. 12, 2024), https://azgovernor.gov/office-arizona-governor/news/2024/04/governor-katie-hobbs-reiterates-protections-arizonans-seeking [https://perma.cc/JU93-5LKD].

77. Press Release, Ariz. Att'y Gen. Kris Mayes, *supra* note 52 ("And let me be completely clear, as long as I am Attorney General, no woman or doctor will be prosecuted under this draconian law in this state.").

78. Leila Fadel, *Arizona Attorney General Says She Won't Enforce a 164-Year-Old Abortion Law*, NPR (Apr. 12, 2024, 7:17 AM), https://www.npr.org/2024/04/12/1244265593/arizona-attorney-general-says-she-wont-enforce-a-164-year-old-abortion-law [https://perma.cc/8N9Z-HQBB].

79. Press Release, Off. of the Ariz. Governor Katie Hobbs, Governor Katie Hobbs Signs Bill into Law Officially Repealing 1864 Abortion Ban (May 2, 2024), https://azgovernor.gov/office-arizona-governor/news/2024/05/governor-katie-hobbs-signs-bill-law-officially-repealing-1864 [https://perma.cc/JYD6-AVEP].

which created a state constitutional right to abortion until fetal viability.[80] As of this Comment's publication, litigation was pending to reconcile this constitutional amendment with a fifteen-week abortion limit, and the Hobbs-Mayes Policy remained in place.[81]

While commentators have focused on the novel challenges raised by Arizona's substantive abortion law, they have paid less attention to the mechanics of Governor Hobbs's EO.[82] The EO and the resulting Hobbs-Mayes Policy is an example of supersession: a legal mechanism that grants state officials a degree of control over local prosecutors.[83] The next Part discusses state supersession power and its contours.

## II. SUPERSESSION POWER

Local prosecutors handle the vast majority of criminal cases in the nation, but local prosecutors still operate under certain constraints.[84] This Comment focuses on one of these constraints: supersession, a little-known but widely available legal mechanism that allows state officials to intervene in local prosecutions and, sometimes, to overrule local prosecutors.[85] This Part defines supersession, describes the different types of supersession statutes

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80. Sejal Govindarao, *Arizona Voters Guarantee the Right to Abortion in the State Constitution*, ASSOCIATED PRESS (Nov. 6, 2024, 2:03 AM), https://apnews.com/article/arizona-election-abortion-4c73ce02932bdccb0ccdc6be94babfd2 [https://perma.cc/8B39-2EWL].

81. *See* Gloria Rebecca Gomez, *Arizona Voters Said Yes to Abortion Rights, But Old Restrictions Are Still on the Books*, ARIZ. MIRROR (Nov. 26, 2024, 11:32 AM), https://azmirror.com/2024/11/26/arizona-voters-said-yes-to-abortion-rights-but-old-restrictions-are-still-on-the-books [https://perma.cc/B8DZ-FD89] (quoting AG Mayes as saying that although the fifteen-week abortion restriction is now unconstitutional, "officially nullifying the 15-week ban will [still] need to take place in the courts"); *see also Reuss v. Arizona*, ACLU, https://www.aclu.org/cases/reussvarizona#legal-documents [https://perma.cc/Q25H-8JUG] (Dec. 3, 2024) (tracking the litigation and noting that AG Mayes will not enforce Arizona's fifteen-week restriction while the litigation is pending).

82. *See, e.g.*, Brendan Pierson & Nate Raymond, *Arizona's Top Court Revives 19th Century Abortion Ban*, REUTERS (Apr. 9, 2024, 8:20 PM), https://www.reuters.com/world/us/arizonas-top-court-revives-19th-century-abortion-ban-2024-04-09 [https://perma.cc/Q2GA-426R] (discussing the Arizona Supreme Court's decision and AG Mayes's refusal to enforce the 1864 law, but not Governor Hobbs's EO).

83. *See infra* Section II.A.

84. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545 (2011) ("[L]ocal prosecutors are responsible for the vast bulk of criminal law enforcement within a state.").

85. *See id.* at 545–50; *see also* Tyler Quinn Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 110–11 (2018).

used across the nation, and highlights some key cases that are relevant to Arizona's supersession statute.

### *A. What Is Supersession?*

Supersession allows a state official to "override" a local prosecutor by intervening in local prosecutions.[86] In some states, the supersession statute allows a state official to intervene as a de facto supervisor, who can direct a local prosecutor to take action in a criminal case or dismiss charges already brought.[87] In other states, the supersession statute allows a state official or court to "take over" the case from a local prosecutor and reassign it to someone else, such as the AG.[88] While the mechanics vary by state, supersession is meant to act as an "escape valve" through which state governments can "check local prosecutors' exercise of discretion."[89]

Though states allocate most prosecutorial power to local prosecutors, virtually every state has a law that allows state officials to supersede local prosecutors in some way.[90] This may reflect states' attempts to balance "the advantages of centralization against the loss of local values."[91] As discussed in the next Section, the variety of state supersession statutes nationwide demonstrates that states have chosen to calibrate this balance differently.

For the purposes of this Comment, it is also helpful to define what supersession is not. First, this Comment does not address general efforts by states to "preempt" or "supersede" local prosecutors.[92] This Comment is concerned with legal supersession power, as defined by statute.[93] Trends to preempt local prosecutors more globally are nevertheless addressed in the context of the progressive prosecution movement in Part III.

Second, this Comment does not address enforcement actions brought by an AG under concurrent jurisdiction with local prosecutors. Some states grant AGs criminal enforcement powers concurrent with those of a local

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86. Yeargain, *supra* note 85, at 110–11; *see also* Barkow, *supra* note 84, at 550.

87. Yeargain, *supra* note 85, at 110–11.

88. *Id.* at 111.

89. *Id.* at 112; *see also* Abby L. Dennis, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 131 (2007) (arguing for increased use of supersession as an oversight mechanism, "coupled with explicit guidelines for its use and a public review process").

90. Yeargain, *supra* note 85, at 98, 113; *see also* Barkow, *supra* note 84, at 519–20, 545–50.

91. Barkow, *supra* note 84, at 519.

92. Hessick & Su, *supra* note 7, at 1673–80 (documenting efforts to circumvent, sanction, and takeover local prosecutorial power); *see also* Scharff, *supra* note 7, at 1469.

93. Yeargain, *supra* note 85, at 98–99; *see also* Barkow, *supra* note 84, at 550.

prosecuting attorney.[94] State officials may use this concurrent jurisdiction in ways that contradict the will of local prosecutors, but the AG technically does not "supersede" local prosecutors in this instance.[95] An AG acts independently of local prosecutors when using her concurrent jurisdiction, rather than intervening in a local matter.[96] As discussed above, AG Mayes may have concurrent jurisdiction to bring enforcement actions under A.R.S. § 41-193(A)(2).[97] But this does little to answer the legal questions raised by the Hobbs-Mayes *non*prosecution Policy and will not be discussed here.[98] With its scope properly defined, this Comment proceeds to discuss Arizona's supersession statute and how it compares with supersession statutes across the United States.

Many states, like Arizona, permit the state AG to exercise supersession power.[99] It is therefore worth noting how an AG's duties interact with those of local prosecutors. English common law, which applied in the American colonies, permitted AGs to prosecute criminal cases.[100] In many states, the AG no longer has this common-law authority and may only prosecute criminal actions when permitted by statute.[101]

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94. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-193(A)(2) (2024); People v. Dasaky, 709 N.E.2d 635, 640 (Ill. App. Ct. 1999); Josef Nilhas, *Legislative Push Towards Supersession in Missouri: Why the State Attorney General Should Not Be Statutorily Granted Concurrent Jurisdiction with Locally Elected Prosecutors*, 66 ST. LOUIS U. L.J. 775 (2022).

95. *See* Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. 150, 153 (noting how many state bills that attempt to curtail local prosecutors "do not remove discretion explicitly, but rather augment it by granting concurrent jurisdiction to the state attorney general").

96. *See id.*

97. *See supra* notes 47–49 and accompanying text.

98. *See infra* notes 142–44 and accompanying text (discussing the *Dasaky* court's findings on concurrent jurisdiction).

99. *See* Yeargain, *supra* note 85, at 111 ("[A] state official can remove a local prosecutor from a case and reassign it to someone else, including the state official herself.").

100. *See* State *ex rel*. Morrisey v. W. Va. Off. of Disciplinary Couns., 764 S.E.2d 769, 784–86 (W. Va. 2014) (providing citations); *see also Ex Parte* Young, 209 U.S. 123, 161 (1908) ("It would seem to be clear that the attorney general, under his power existing at common law, and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the state . . . .").

101. *See, e.g.*, *Morrisey*, 764 S.E.2d at 786 (acknowledging that, although English common law gave the attorney general power to prosecute cases, West Virginia had "abolished the Attorney General's common law authority to prosecute criminal cases"); State v. Block, 263 P.3d 940, 945 (N.M. Ct. App. 2011) ("In New Mexico, the attorney general has no common law powers; instead, his/her duties are determined entirely by statute."). *But see* People v. Massarella, 382 N.E.2d 262, 264 (Ill. 1978) ("[T]he Attorney General not only retained his common law powers and duties but also could not be deprived of them by the legislature. The legislature could only add to the powers.").

Courts and legislatures generally do not recognize a chain of command between the AG and county attorneys,[102] with a few exceptions.[103] When an AG intervenes locally, the "great majority of interventions come at the request of the local prosecutor,"[104] such as to assist with complex investigations.[105] Courts widely approve of this type of intervention.[106] In line with this principle, some courts have allowed an AG to participate in local prosecutions only when the county attorney is incapacitated, disqualified, or otherwise unavailable.[107]

While local prosecutors remain subject to the State's general supervision and supersession power,[108] AGs rarely intervene in local prosecutions as a practical matter.[109] Local prosecutors and state officials seem to operate "on an implicitly-agreed upon set of mutual expectations: state officials expect

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102. *See* Barkow, *supra* note 84, at 556 ("[T]he relationship between state-level and local prosecutors is coordinate, not hierarchical."); Jenevein v. Willing, 493 F.3d 551, 557 (5th Cir. 2007) (reasoning that the "employer" of elected officials "is the public itself, at least in the practical sense, with the power to hire and fire"); Williams v. State, 184 So. 3d 908, 913 (Miss. 2014) ("[T]he Mississippi Attorney General is not the local district attorney's boss . . . ."). *But see* Fadel, *supra* note 78 (quoting AG Mayes as stating that she has "supervisory authority over the state's 15 county attorneys").

103. *See* Yeargain, *supra* note 85, at 113–14 (noting that Alaska, Delaware, and Rhode Island have a "chain of command" structure because statewide officers direct all criminal prosecutions, and that Montana, New Hampshire, and Washington allow the state AG to supervise local prosecutors); *see also* State v. Young, 941 A.2d 124, 128 (R.I. 2008) ("[T]he Attorney General is the only state official vested with prosecutorial discretion." (quoting State v. Rollins, 359 A.2d 315, 318 (R.I. 1976))).

104. 4 CRIM. PROC. *Attorney General* § 13.3(e), Westlaw (database updated Dec. 2023); *see also* People *ex rel*. Tooley v. Dist. Ct., 549 P.2d 774, 775–76 (Colo. 1976).

105. Barkow, *supra* note 84, at 557–58.

106. *See, e.g.*, State *ex rel*. Nolan v. Dist. Ct., 55 P. 916, 918 (Mont. 1899) (stating that, in the context where a local prosecutor requests assistance, an "attorney general may, in his assistance, do every act that the county attorney can perform, and, in his supervision, may even undo any that he has already done"); Lone Starr Multi Theatres, Inc. v. State, 922 S.W.2d 295, 298 (Tex. App. 1996); People *ex rel.* Castle v. Daniels, 132 N.E.2d 507, 509 (Ill. 1956).

107. *See* People v. Flynn, 31 N.E.2d 591, 593 (Ill. 1940) (holding that the AG improperly took exclusive charge of proceedings where state's attorney had not refused to act and was not disqualified, absent, or sick); People v. Massarella, 382 N.E.2d 262, 266 (Ill. 1978) (implying AG intervention was acceptable because the local prosecutor did not object); State v. Huett, 104 S.W.2d 252, 260 (Mont. 1937) (allowing AG to prosecute on behalf of the state in the unique circumstances where the local prosecuting attorney was the defendant, charged with murder).

108. *See* Barkow, *supra* note 84, at 545–50, 553, 557–58 (noting that AGs in several states such as Illinois, South Dakota, and New Jersey have used their power to intervene in local prosecutions sparingly); *see also* Yurick v. State, 875 A.2d 898, 903 (N.J. 2005).

109. Yeargain, *supra* note 85, at 109 ("[L]ocal prosecutors and statewide officials appear to have developed an equilibrium over the last half-century, which explains the historically low rate of supersession."); Barkow, *supra* note 84, at 553, 557–58; People v. Dasaky, 709 N.E.2d 635, 640 (Ill. App. Ct. 1999).

that local prosecutors will vigorously enforce the laws passed by the state legislature, and local prosecutors expect that, in all but the rarest cases, their discretion will not be superseded."[110] This understanding makes sense given the historical role of each enforcement actor. Local prosecutors handle the vast majority of criminal prosecutions, and AGs focus their resources on enforcement actions that benefit from state centralization, such as election fraud.[111]

Some scholars have theorized that this natural equilibrium between state and local actors may not hold in modern times.[112] These predictions seem to be coming true: supersession bills and actions have increased around the nation, indicating that state officials are more willing to intervene in local prosecutions.[113] To provide context for this trend, the next Section takes a closer look at Arizona's supersession statute, A.R.S. § 41-193(A)(5), and compares it with other supersession statutes from across the nation.

### *B. Arizona's Supersession Statute*

Every state allows for some form of supersession or state control of local prosecutors.[114] Supersession is a creature of statute, which makes it difficult to generalize about how supersession operates nationwide. Tyler Quinn Yeargain categorizes state supersession statutes into five different models, based on the level of state interference they permit.[115] This Comment focuses on Arizona's supersession statute and uses Yeargain's models to explore the statute's mechanics.

A.R.S. § 41-193(A)(5) states that "unless otherwise provided by law," the AG shall, "[a]t the direction of the governor, or if deemed necessary, assist the county attorney of any county in the discharge of the county attorney's duties."[116] In other words, Arizona's supersession power can be triggered (1) when the governor directs the AG to intervene, or (2) when the AG deems

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110. Yeargain, *supra* note 85, at 109.

111. Barkow, *supra* note 84, at 546–50 (noting that states usually vest the AG "with exclusive or concurrent jurisdiction over just a handful of areas that repeat themselves in state after state" such as public corruption, election fraud, regulatory crimes, or when the local prosecutor has a conflict); *see, e.g.*, *Criminal Division*, ARIZ. ATT'Y GEN., https://www.azag.gov/criminal [https://perma.cc/67F3-AKTH] (listing the Arizona AG's areas of criminal prosecution including election integrity, healthcare fraud and abuse, and special investigations).

112. Yeargain, *supra* note 85, at 109; *see also* Gregg, *supra* note 59; Pfaff, *supra* note 13.

113. CAMACHO ET AL., *supra* note 7, at 3–14.

114. Yeargain, *supra* note 85, at 98; Barkow, *supra* note 84, at 545–50.

115. Yeargain, *supra* note 85, at 111–12.

116. ARIZ. REV. STAT. ANN. § 41-193(A)(5) (2024).

the intervention "necessary." These two criteria align with two of Yeargain's models of supersession: Model #3, which allows supersession when requested by a state official or members of the public, and Model #1, which allows supersession in all cases.[117]

This Comment will focus primarily on Model #1, because the benefits and challenges created by supersession are most apparent there. Under this model, a state prosecutor can supersede a local prosecutor in all cases.[118] For example, A.R.S. § 41-193(A)(5) merely requires that the AG considers their intervention "necessary" to assist the county attorney.[119] Similarly, Alabama allows supersession whenever the AG deems it "proper."[120] Supersession statutes like Alabama's and Arizona's "attach superficial, weak preconditions on supersession," such that there is "no meaningful statutory limit" on supersession power.[121] Model #1 supersession statutes reflect a state legislature's choice to prioritize statewide uniformity over local control.[122]

Arizona's supersession statute also implicates Model #3, which allows supersession when someone directs or requests that the AG supersede a local prosecutor.[123] Nearly half of states use this model, and there is wide variation in which actor may request intervention by the AG.[124] In many states, the governor may direct the AG to intervene, like in Arizona.[125] In some states, the legislature, courts, or private citizens may request that the AG intervene.[126] This model ensures, in theory, that the AG invokes supersession power in response to legitimate concerns of elected officials or the public, rather than based on the AG's judgment alone.[127]

Yeargain's other categories do not apply to Arizona, but they demonstrate how supersession statutes can be drafted to have greater restrictions than

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117. Yeargain, *supra* note 85, at 113–21.

118. *Id.* at 113–15.

119. § 41-193(A)(5). *But see infra* Section II.C (discussing how the word "assist" may function as a limit on supersession power in Arizona).

120. Yeargain, *supra* note 85, at 114.

121. *Id.* at 115; *see also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1171 (2005) (noting that, like broad delegations in administrative law, legislatures passing criminal statutes "declare crime to be bad, authorize an enormous range of discretionary outcomes, and leave the difficult and politically controversial judgments to prosecutors").

122. *See* Yeargain, *supra* note 85, at 115.

123. *Id.* at 118–21.

124. *Id.* at 119; *see, e.g.*, Commonwealth v. Briggs, 12 A.3d 291, 328 (Pa. 2011) (noting that Pennsylvania's statute allows the district attorney to request the AG's intervention due to lack of resources or a conflict of interest).

125. Yeargain, *supra* note 85, at 118–19.

126. *Id.* at 119.

127. *Id.* at 121.

those in Arizona's statute. For example, states using Model #4 only allow supersession when a prosecutor "refuses or fails to act."[128] States using Model #5 allow a local prosecutor to be superseded only with the explicit authorization of a court or independent commission.[129] Yeargain argues that Model #4, especially as implemented in Pennsylvania, provides "more meaningful protections of prosecutorial discretion" and aligns best with prosecutors' mandate to "do justice."[130]

To promulgate the Hobbs-Mayes Policy, Governor Hobbs used her supersession power under A.R.S. § 41-193(A)(5) in alignment with Model #3. She directed AG Mayes to supersede local prosecutors. Interestingly, though, AG Mayes may have also been able to supersede local prosecutors without the Governor's instruction if she deemed it "necessary," as described by Model #1.[131] The fact that the Governor and the AG could independently initiate a supersession action in Arizona raises interesting hypotheticals. What if a state AG decided it was "necessary" to supersede local prosecutors, but the governor disagreed? While these questions are not implicated by the Hobbs-Mayes Policy, they may matter in future supersession actions, especially if a governor and AG do not share the same political goals.[132]

Though Arizona's statute contains an expansive grant of power, it is not boundless. A few key cases indicate that Arizona's statute may also contain limiting language, explored in the next Section.

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128. *Id.*

129. *Id.* at 124.

130. *Id.* at 122–23, 123 n.168 (citing Berger v. United States, 295 U.S. 78, 88 (1935)); *see also* Dennis, *supra* note 89, at 134 (noting that others could "intervene when prosecutorial conduct threatens the public trust, such as in cases involving conflicts of interest, allegations of prosecutorial misconduct, political controversy, and DNA exonerations").

131. ARIZ. REV. STAT. ANN. § 41-193(A)(5) (2024). Yeargain assumes that this subsection means that the AG is the one who deems it necessary to intervene, though it does not explicitly say so. *See* Yeargain, *supra* note 85, at 114. Though unlikely, a statutory interpretation argument could be made against this assumption, because subsection (A)(2) does explicitly name the AG. *Compare* § 41-193(A)(2) (2024) ("if deemed necessary *by the attorney general*" (emphasis added)), *with* § 41-193(A)(5) ("if deemed necessary").

132. *See* Barkow, *supra* note 84, at 540 ("[T]he state attorney general is less likely to be a puppet of party sentiment than a controller of it, because the attorney general is often a leader in state party politics . . . .").

### *C. Supersession Case Law: "Assist"*

In many states, once the AG intervenes, she takes full control of a case and makes decisions as if she were the local prosecutor.[133] Some states such as Arizona, however, limit the AG to "assisting" the local prosecutor.[134] This raises the question of whether superseding a local prosecutor against his or her will qualifies as "assistance."[135] Opponents of the Hobbs-Mayes Policy have argued that the Policy exceeds the AG's statutory authority, because a nonprosecution policy does not "assist" local prosecutors so much as usurp their discretion.[136] How courts interpret the word "assist" could therefore limit the AG's broad power to supersede whenever she deems it "necessary."

Because AGs rarely supersede local prosecutors, courts have had little opportunity to explore the contours of supersession power.[137] To date, only a few courts have addressed the meaning of "assistance" in the supersession context.[138] In *Williams v. State*, the Mississippi Supreme Court interpreted "assist" narrowly and held that it did not encompass scenarios where the AG proceeded against the will of the local prosecutor.[139] The *Williams* court construed the meaning of "assist" this way because Mississippi's supersession statute says that the AG must manage all litigation on behalf of the state "except as otherwise specifically provided by law," and a different statute provided that local prosecutors handle "all" criminal prosecutions.[140] The *Williams* court therefore circumscribed supersession power by reading local prosecutors' statutory power as a limitation implicit in the supersession statute's "otherwise provided by law" exception.[141]

Illinois courts have also interpreted "assist" narrowly.[142] In *People v. Dasaky*, an Illinois appeals court determined that the AG "lacks the power to take exclusive charge" of cases where she shares concurrent jurisdiction with the local prosecutor.[143] The AG can only advise local prosecutors, attend the

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133. Yeargain, *supra* note 85, at 125; *see also Ex Parte* King, 59 So. 3d 21, 28 (Ala. 2010) (holding that, where the AG clearly instructs that litigation should be dismissed, his instructions "take precedence over a district attorney's desire to proceed with the action").

134. Yeargain, *supra* note 85, at 125–26, 125 n.188 (citing statutes from Illinois, Indiana, Maine, Massachusetts, and Mississippi).

135. *Id.* at 125–26.

136. *See supra* Section II.B.

137. *See* Yeargain, *supra* note 85, at 108–09, 117, 127.

138. *Id.* at 125–26.

139. Williams v. State, 184 So. 3d 908, 914–15 (Miss. 2014).

140. *Id.* at 914.

141. *Id.*

142. People v. Dasaky, 709 N.E.2d 635, 640 (Ill. App. Ct. 1999).

143. *Id.*

trial, and "assist" in the prosecution.[144] While *Dasaky* deals with concurrent jurisdiction rather than supersession power, it demonstrates that courts seem inclined to interpret "assistance" in a way that limits the AG's authority.[145]

While current case law supports a narrow reading of assistance,[146] a plausible argument could be made for a broader interpretation depending on the circumstances surrounding the supersession action. For example, because Arizona abortion law is currently unclear, it could be argued that it does assist local prosecutors to centralize prosecutions related to a new, complex area of law in the AG's office.[147] Still, the narrow view of "assistance" adopted by Mississippi and Illinois courts may comport best with the plain meaning of "assist," which is to help or aid someone.[148] It would likely not help or aid a local prosecutor to act against their wishes.

In sum, Arizona's supersession statute is quite broad.[149] It allows both the Governor and the AG to invoke supersession power.[150] A court may, however, read "assist" narrowly to limit the power of the AG or Governor to act against the will of local prosecutors.[151] Beyond these general contours, the statute's scope remains fuzzy. State officials wishing to invoke or limit state supersession power in the future have ample room to present statutory interpretation arguments about words like "assist" or "necessary" and how A.R.S. § 41-193(A)(5) works in conjunction with other Arizona statutes.

Despite the broad supersession power that many legislatures grant to state officials, in Arizona and nationwide, supersession power has historically not mattered much.[152] AGs have chosen to direct their attention to statewide concerns, unless local prosecutors request assistance.[153] This may be changing, however. Commentators have noted an increase in the use of supersession or state preemption to curtail local policymaking, especially in

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144. *Id.*

145. *See* Barkow, *supra* note 84, at 558–59.

146. *Id.* at 557; Yeargain, *supra* note 85, at 125–26.

147. *See infra* Sections IV.B.1, IV.D.

148. *See Assist*, OXFORD ENG. DICTIONARY, https://www.oed.com/search/dictionary/?scope=Entries&q=assist [https://perma.cc/RSX5-6XM2].

149. *See generally supra* Section II.B.

150. *Id.*

151. *See generally supra* Section II.C.

152. *See* Yeargain, *supra* note 85, at 108–09 ("Under the current statutory regimes, cases of supersession have been exceedingly rare.").

153. Barkow, *supra* note 84, at 553, 557–58 (noting that AGs in several states such as Illinois, South Dakota, and New Jersey have used their power to intervene in local prosecutions sparingly).

"left-leaning municipalities of otherwise conservative states."[154] This may be because, in many states, "the state-local divide is also where the partisan divide is most politically salient. Red states chafe against the policies favored by blue cities. Red towns resist the laws adopted by blue states."[155]

Yeargain argues that AGs have rarely invoked supersession power because they assume that local prosecutors will "vigorously enforce the laws passed by the state legislature."[156] If this is true, then AGs may be more likely to intervene when they see local prosecutors declining to enforce certain categories of laws, as many progressive prosecutors have promised to do.[157] To provide greater context for the rise of supersession, the next Part discusses the progressive prosecution movement, the rise of blanket DPs, and how courts have responded.

## III. PROGRESSIVE PROSECUTION AND BLANKET DPS

Prosecutors have wide discretion in how they enforce criminal laws.[158] Their decision-making is generally unreviewable, absent a clear abuse of discretion.[159] Prosecutors' priorities are typically not known to the public[160] and can be shaped by factors such as evidentiary issues, voter preferences, political considerations, and funding and resource limitations.[161] Despite this

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154. Yeargain, *supra* note 85, at 109 ("As more reformers are elected—especially in liberal municipalities of otherwise conservative states—laws allowing supersession may be used with increasing frequency whenever they are available."); Pfaff, *supra* note 13 ("Preemption poses a serious, if not existential, threat to reform, especially for blue cities in red states."); CAMACHO ET AL., *supra* note 7, at 3–14.

155. Hessick & Su, *supra* note 7, at 1700.

156. Yeargain, *supra* note 85, at 109.

157. *Id.* at 108–09.

158. *See, e.g.*, David A. Lord, *In Defense of the Juggernaut: The Ethical Argument for Prosecutorial Discretion*, 31 AM. U. J. GENDER SOC. POL'Y & L. 141, 152 (2023).

159. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005) (noting that local prosecutors "case selection decisions are unreviewable"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) (noting that prosecutors do not "operate in the sunshine of public disclosure").

160. *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 512 (2016) ("The 'locally elected status' of American prosecutors gives legitimacy to their broad, virtually unreviewable discretion, while the technical nature of their work helps to make public assessments of their performance superficial and often perfunctory."); Bibas, *supra* note 159, at 961.

161. *See* Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. ST. L.J. 841, 848, 867, 874 (2024); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 823, 827–28, 846–47 (2020). *But see* Michael Tonry, *Prosecutors and*

immense power, there has been a "historical lack of clarity or consensus regarding what prosecutors should do and what the prosecutorial role should entail."[162] The lodestar language from *Berger v. United States*—that prosecutors must ensure "justice shall be done"—leaves much room for interpretation.[163]

The progressive prosecution movement, which crystallized during the early 2010s, proposes that "doing justice" means using prosecutorial discretion to reform the criminal justice system in some way.[164] This Comment places the Hobbs-Mayes Policy in the context of the progressive prosecution movement to analyze its goals, strengths, and weaknesses. This Part provides a brief overview of the progressive prosecution movement and focuses on one tool invoked by progressive prosecutors: blanket DPs. It then discusses how blanket DPs have become a flashpoint in the debates over prosecutorial discretion and criminal justice policymaking.

### *A. The Progressive Prosecution Movement*

The voting American public has become more interested in criminal justice policy over the last two decades.[165] As of 2016, the majority of Americans believed that prisons held too many drug offenders, supported ending mandatory minimum sentencing, and favored reform programs for people who are incarcerated.[166] In response to this shift in public opinion,

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*Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 12 (2012) (arguing that political judgments should not affect individual cases); Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 652 (2023) (arguing the same).

162. Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1426 (2021).

163. Berger v. United States, 295 U.S. 78, 88 (1935) (opining that the role of a prosecutor is "not that it shall win a case, but that justice shall be done"); *see also* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1254 (2020) ("We tell prosecutors to 'do justice' and hope for the best. The resulting dissatisfaction with prosecutorial behavior should come as no surprise."); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 806 (2020) (advancing a conception of the prosecutorial role based on fiduciary duty).

164. Hessick & Su, *supra* note 7, at 1673–74; Levin, *supra* note 162, at 1423–24.

165. Ronald F. Wright et al., *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 127–28 (2021) (discussing a study showing that between 2012 and 2020, the likelihood that an incumbent prosecutor would run unopposed dropped 8% each passing year, in both large and small districts); Levin, *supra* note 162, at 1422–25 (discussing how prosecutor elections have grown to include more candidates with more varied platforms); Yeargain, *supra* note 85, at 105–07.

166. *Voters Want Big Changes in Federal Sentencing, Prison System*, PEW CHARITABLE TR. (Mar. 8, 2016), https://www.pewtrusts.org/en/research-and-analysis/articles/2016/02/12/voters-

counties across the nation have elected "progressive" district attorneys ("DAs") such as New York County DA Alvin Bragg, Philadelphia DA Larry Krasner, Los Angeles County DA George Gascón, Cook County State's Attorney Kim Foxx, and San Francisco DA Chesa Boudin.[167]

While there is no agreed-upon definition of what makes a "progressive prosecutor," a progressive prosecutor's platform will typically "sound in some sort of reformist discourse."[168] "Progressive prosecutor" can describe prosecutors who hold left-leaning values or who are anti-carceral and wish to shrink the footprint of the criminal justice system.[169] Progressive prosecutors may focus on reducing incarceration through means such as expanding diversion programs, ending cash bail, and reducing parole.[170] Progressive prosecutors may also enact blanket DPs for certain categories of offenses, a controversial practice that will be the focus of this Part.

Progressive prosecutors have been elected in growing numbers.[171] One scholar estimates that, by 2022, there were more than seventy reform prosecutors in office nationwide by 2022, collectively presiding over 20% of Americans.[172] The "progressive prosecution brand has proved popular" among voters and the criminal justice reform community.[173]

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want-changes-in-federal-sentencing-prison-system [https://perma.cc/3MTF-JU2L]; *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017, 10:15 AM), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/XU5S-B8NA] (reporting research findings that 71% of Americans think it is important to reduce the American prison population).

167. *See, e.g.*, John F. Pfaff, *The Poor Reform Prosecutor: So Far from the State Capital, So Close to the Suburbs*, 50 FORDHAM URB. L.J. 1013, 1013, 1018, 1020–21 (2023); Hessick & Su, *supra* note 7, at 1673–74; Connor Sheets, *Your Guide to the L.A. County District Attorney's Race: Gascón vs. Hochman*, L.A. TIMES (Oct. 3, 2024, 3:00 AM), https://www.latimes.com/california/story/2024-10-03/2024-los-angeles-county-district-attorney-gascon-hochman-voter-guide.

168. Levin, *supra* note 162, at 1417, 1424; *see also* Hessick & Su, *supra* note 7, at 1674; Pfaff, *supra* note 167, at 1020.

169. Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 HARBINGER 130, 135 (2022); Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 FORDHAM URB. L.J. 973, 978 (2023).

170. FAIR & JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 4, 6–7, 13–14 (2018), https://www.brennancenter.org/our-work/policy-solutions/21-principles-21st-century-prosecutor [https://perma.cc/NZY5-VY6W]; Press Release, Alvin L. Bragg, Jr., Manhattan Dist. Att'y, Manhattan District Attorney Alvin Bragg Releases Comprehensive Reforms to Deliver Safety and Justice for All (Jan. 4, 2022), https://manhattanda.org/manhattan-district-attorney-alvin-bragg-releases-comprehensive-reforms-to-deliver-safety-and-justice-for-all [https://perma.cc/VR6U-QEVA]; Angela Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 5 (2019).

171. Pfaff, *supra* note 167, at 1013.

172. *Id.*

173. Hessick, *supra* note 169, at 977.

Despite its popularity, progressive prosecution has engendered significant backlash.[174] Some believe that mechanisms promoted by progressive prosecutors, including declining to prosecute low-level offenses, are undesirable and decrease public safety.[175] On the other end of the spectrum, progressive activists have critiqued prosecutors for not going far enough to enact reform.[176] Author Emily Bazelon notes that many progressive prosecutors found themselves "caught between the entrenched bureaucracies they'd inherited and the impatience of the advocates who'd worked to elect them."[177] Voters' increased interest in criminal justice reform and the policies of prosecutors have turned formerly humdrum local elections into major political affairs.[178]

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174. *Id.* at 973; Jeremey B. White, *San Francisco District Attorney Ousted in Recall Election*, POLITICO (June 8, 2022, 12:17 AM), https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002 [https://perma.cc/98E2-E7PD]; Wendy N. Davis, *Progressive Prosecutors Are Encountering Pushback*, A.B.A. J. (July 21, 2022, 3:50 PM), https://www.abajournal.com/web/article/progressive-prosecutor-pushback [https://perma.cc/BD6L-3QCS].

175. James Queally, *Is It Fair to Blame Gascón Alone for L.A.'s Violent Crime Surge? Here's What the Data Show*, L.A. TIMES (Apr. 1, 2022, 5:00 AM), https://www.latimes.com/california/story/2022-04-01/violent-crime-surge-la-county-george-gascon (recounting L.A. County Sheriff's comments that thieves were emboldened by DA Gascón's refusal to prosecute low-level crimes); JOHN A. LAWRENCE, SELECT COMM. ON RESTORING L. & ORD., PA. HOUSE OF REPRESENTATIVES, SECOND INTERIM REPORT 21 (2022), https://www.pahousegop.com/Display/SiteFiles/1/2022/Select%20Committee%20on%20Restoring%20Law%20and%20Order%202ndInterim%20Report%20102422.pdf [https://perma.cc/VTD7-4WDA] ("Apparently blinded by the goal of implementing progressive policies at any cost, DA Krasner has contributed to a catastrophic rise in violent crime at the expense of public safety."); Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019, 9:01 AM), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286 [https://perma.cc/M2RB-B2N3] (reporting then-U.S. Attorney General Bill Barr's statement that progressive prosecution is "demoralizing to law enforcement and dangerous to public safety").

176. *See* Malik Neal, *What the Pandemic Revealed About 'Progressive' Prosecutors*, N.Y. TIMES (Feb. 4, 2021), https://www.nytimes.com/2021/02/04/opinion/prosecutors-bail-reform.html ("In the midst of a pandemic, when bold, radical change is needed most, too many 'progressive' prosecutors have largely not shown up as the heroes some hoped they would be."); Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141; Yamahiro & Garzón-Montano, *supra* note 169, at 130, 132, 134, 168 (arguing that progressive prosecution distracts from the goal of ending mass incarceration).

177. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 149 (2019).

178. Hessick & Su, *supra* note 7, at 1674–75 ("Although the idea of prosecutors working towards reform is not necessarily new, the political salience is."); Wright et al., *supra* note 165, at 125 ("What was once deemed an apolitical event . . . has become an occasion for the broader public to make genuine choices.").

### *B. Blanket DPs as a Progressive Prosecution Tool*

One common but controversial tool used by progressive prosecutors is blanket DPs.[179] As one scholar has noted, "[a]s mighty as the power to pursue the penal sanction is the power to demur."[180] While prosecutors are charged with enforcing all criminal laws, it is not realistic—and probably not desirable—that all criminal violations be enforced.[181] Some research suggests that roughly 25% to 50% of all cases referred to prosecutors are declined for prosecution.[182] Prosecutors may decline to prosecute cases when they lack sufficient evidence, when they wish to secure cooperation from a co-defendant, or when mitigating circumstances are present.[183] This wide discretion allows prosecutors to allocate limited resources in a way that best promotes justice and public safety.[184] The ability to prioritize which charges to pursue is at the heart of prosecutorial discretion.[185]

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179. Hessick, *supra* note 169, at 980 ("Using prosecutorial power less is the framing that is most often highlighted in the burgeoning academic literature about the [progressive prosecution] movement.").

180. Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1098 (2022).

181. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 795 (2012) ("In an overcriminalized world, prosecutors are already decriminalizing conduct through their discretionary decisionmaking—as a matter of fact, they seem to have no other choice but to do so."); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1662–63 (2010) (arguing that giving prosecutors no discretion is "both untenable and unattractive"); Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 479 (2020).

182. Luna, *supra* note 181, at 795.

183. *See* A. Shea Daley Burdette & Jacob Carruthers, *Judicial Review of Prosecutorial Blanket Declination Policies*, 20 OHIO ST. J. CRIM. 179, 184–85 (2022); Wright, *supra* note 161, at 824, 829–30; Bowers, *supra* note 181, at 1655 (describing three reasons prosecutors might decline charges: legal, administrative, and equitable reasons).

184. *See* Wright, *supra* note 161, at 823 (noting that state funding of local prosecutors "is not sufficient to allow full enforcement of the criminal law" and the state therefore "empowers the local prosecutor to allocate scarce resources"); Bowers, *supra* note 181, at 1662–63 (arguing that prosecutors should "individualize justice"); *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 24, 2022), https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf [https://perma.cc/UZ2X-6472] ("Prosecutors make decisions every day about how to allocate limited resources and which cases to prosecute.").

185. *See* Luna, *supra* note 181, at 796 (arguing that, when deciding to decline to prosecute, "prosecutors are exercising the fullest expression of their discretion"); John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2573 (1997) ("Prosecutorial discretion is a staple of our criminal justice system."); Burdette & Carruthers, *supra* note 183, at 184.

Prosecutors have historically exercised their broad discretion on a case-by-case basis.[186] Many scholars argue that these individualized determinations are essential, in part because this aligns with traditional conceptions of executive-branch enforcement.[187] As the criminal justice system's footprint has grown,[188] however, prosecutors are under pressure to process a high volume of cases quickly and fairly.[189] Advocates for criminal justice reform have encouraged prosecutors to decline more charges and disclose when they do so.[190] Many prosecutors are responding to these concerns by speaking more openly about their charging policies.[191]

These practical considerations helped shape the rise of blanket DPs, which make declining prosecution the default position for prosecutors in a jurisdiction.[192] These policies may also be referred to as "categorical nonenforcement" because prosecutors choose not to enforce criminal penalties for an entire category of cases, rather than exercising discretion on a case-by-case basis.[193] Blanket DPs may focus on certain crimes, such as drug possession, or they may focus on a specific type of defendant, such as juveniles, sex workers, or people who lack housing.[194] Prosecutors may even go a step further and announce "anticipatory declinations," or plans to not enforce proposed laws.[195] Recently, certain prosecutors have announced anticipatory declinations for prospective laws on gun control and abortion.[196]

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186. Price, *supra* note 161, at 651; Wright, *supra* note 161, at 824; Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 754 (2020) (noting that decisions not to prosecute "were conventionally made on an individual, case-by-case basis, not categorically").

187. Burdette & Carruthers, *supra* note 183, at 184; *see infra* notes 214–17 and accompanying text.

188. *See* ASHLEY NELLIS, SENT'G PROJECT, MASS INCARCERATION TRENDS 1–5 (2024), https://www.sentencingproject.org/app/uploads/2024/05/Mass-Incarceration-Trends.pdf [https://perma.cc/Q8S8-GUK3].

189. Burdette & Carruthers, *supra* note 183, at 184 & n.27 (noting the proliferation of criminal statutes).

190. *See* Angela J. Davis, *Prosecutors, Democracy, and Race*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 195, 209–10 (Máximo Langer & David A. Sklansky eds., 2017) (arguing for more informational campaigns about prosecutorial work).

191. Wright, *supra* note 161, at 827–28.

192. *See* Burdette & Carruthers, *supra* note 183, at 186; Roth, *supra* note 181, at 479–80 ("In an era of expansive criminal law and finite government resources, declinations constitute an ever more significant piece of the criminal justice picture . . . .").

193. Price, *supra* note 161, at 655.

194. Wright, *supra* note 161, at 824.

195. *Id.* at 833; *see also* FAIR & JUST PROSECUTION, *supra* note 184.

196. Wright, *supra* note 161, at 833; *see also* FAIR & JUST PROSECUTION, *supra* note 184.

Blanket DPs have become a common practice of progressive prosecutors.[197] For example, in his first few days in office, New York County DA Alvin Bragg established an office-wide nonprosecution policy for marijuana misdemeanors, prostitution, fare evasion, and other offenses.[198] Los Angeles County DA George Gascón limited prosecution for crimes linked to addiction or homelessness, such as disturbing the peace, drug possession, loitering, or public intoxication.[199] Philadelphia DA Larry Krasner instructed his staff not to prosecute marijuana possession nor prostitution, with some exceptions.[200] Although nonprosecution policies are currently associated with progressive prosecutors, prosecutors from across the political spectrum have used categorical declination policies.[201]

State legislatures seem to dislike blanket DPs,[202] and several have considered or passed bills that would limit local prosecutors from enacting declination policies.[203] Specifically, Iowa's S.F. 342 allows the state's AG to sue a local prosecutor and withhold state funding if the local prosecutor enacts a policy prohibiting enforcement of a certain state law.[204] Similarly, Tennessee H.B. 9071 allows the state AG to petition a state court to appoint a special prosecutor if a local prosecutor adopts a blanket DP.[205]

Even when supersession bills have failed, some states have attempted to circumvent local declination policies in other ways.[206] For example, after Suffolk County DA Rachael Rollins released a blanket DP for certain low-level crimes, some Massachusetts judges declined her requests to dismiss

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197. *See* Wright, *supra* note 161, at 828 ("[T]he charging practices of an office should appear near the top of any reformer's list.").

198. *See* Letter from Alvin L. Bragg, Jr., Manhattan Dist. Att'y, to All Staff, N.Y. Cnty. Dist. Att'y's Off. (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/ZB4H-VQH4].

199. Queally, *supra* note 175.

200. Memorandum from Larry Krasner, Phila. Dist. Att'y, Philadelphia DAO New Policies (Feb. 15, 2018), https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf [https://perma.cc/3V7N-P355].

201. *See* Wright, *supra* note 161, at 832–33 (describing how a Tennessee prosecutor stated that he would not enforce domestic violence laws in cases involving same-sex couples and how Virginia prosecutors declared that they would not enforce gun control laws).

202. CAMACHO ET AL., *supra* note 7, at 3.

203. *Id.*

204. *Id.* at 3, 13.

205. *Id.* at 3, 11.

206. *See, e.g.*, Goldrosen, *supra* note 95, at 150 (describing how the Pennsylvania legislature quietly passed a provision in their budget to expand the state AG's concurrent jurisdiction to limit the power of Philadelphia DA Larry Krasner); Krasner v. Ward, 292 A.3d 624 (Pa. Commw. Ct. Jan. 12, 2023) (unpublished table decision) (evaluating whether the Pennsylvania state legislature can impeach Krasner).

charges.[207] At the federal level, proponents of Project 2025—a conservative movement aimed at reshaping the executive branch—recommend that the Department of Justice initiate legal actions against district attorneys who refuse to prosecute certain criminal offenses.[208]

Scholars "expect this preemption trend to not just continue, but to accelerate."[209] This trend is likely to accelerate in part because local prosecutors are expanding their use of blanket DPs into more politically charged areas. While most blanket DPs focus on low-level offenses, prosecutors have increasingly used blanket DPs for controversial issues such as the death penalty,[210] gun rights,[211] and abortion.[212] This may heighten the concerns of state and federal officials that local prosecutors are stepping beyond their proper role.[213]

### *C. Normative Arguments*

Blanket DPs offer practical benefits, but they also raise political and legal challenges. Prosecutors who promulgate blanket DPs argue that they decrease

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207. CAMACHO ET AL., *supra* note 7, at A6.

208. PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 553 (2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/QV77-P56V] (explaining that this type of DOJ enforcement may be most appropriate for "jurisdictions that refuse to enforce the law against criminals based on the Left's favored defining characteristics of the would-be offender (race, so-called gender identity, sexual orientation, etc.) or other political considerations (e.g., immigration status)").

209. CAMACHO ET AL., *supra* note 7, at 4.

210. *See, e.g.*, Ayala v. Scott, 224 So. 3d 755 (Fla. 2017); Wharton v. Vaughn, No. 01-cv-6049, 2022 WL 4133291, at *1 (E.D. Pa. Sept. 12, 2022).

211. *See, e.g.*, *New Law Seems Unlikely to Alter Philadelphia Gun Law Prosecutions*, CBS NEWS (July 9, 2019, 7:57 PM), https://www.cbsnews.com/philadelphia/news/new-pennsylvania-law-josh-shapiro-unlikely-alter-philadelphia-gun-law-prosecutions-larry-krasner [https://perma.cc/JCT9-A2VX] (describing Philadelphia DA Krasner's willingness to allow defendants in gun cases to enter diversion programs); Wright, *supra* note 161, at 832–33 (describing some prosecutors' announcement that they would not enforce gun control laws).

212. *See, e.g.*, Interview by Lauren-Brooke Eisen with Miriam Krinsky, Exec. Dir., Fair & Just Prosecution (May 16, 2022), https://www.brennancenter.org/our-work/research-reports/prosecutors-pledging-not-enforce-abortion-bans [https://perma.cc/M7JF-UEKF]; FAIR & JUST PROSECUTION, *supra* note 184.

213. *Cf.* David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 276, 277 (2017) (Maximo Langer & David Alan Sklansky eds., 2017) ("Prosecutors blur the boundaries . . . between law and discretion."); Valdes v. State, 728 So. 2d 736, 739 (Fla. 1999) (noting that "state attorneys fulfill a unique role, which is both quasi-judicial and quasi-executive" and that "[t]his unique role is due to the tradition of their exclusive discretion in prosecution").

burdens on the criminal justice system and on taxpayers.[214] Prosecutors may wish to decline to prosecute cases that require a large expenditure of resources, especially when they view this cost as outweighing the benefit.[215] Of course, how a DA perceives the "benefit" of prosecution will depend on their policy preferences. For example, many DAs view blanket DPs for drug crimes as a way to mitigate racial disparities in the criminal justice system.[216] This choice reveals a policy preference for reducing racial disparities over enforcing narcotics penalties. Prosecutors also often promulgate blanket DPs for misdemeanor offenses, which allows them to redirect resources toward prosecuting more violent crimes.[217]

A handful of legal scholars have looked favorably on the growing use of blanket DPs. W. Kerrel Murray has argued that blanket DPs are akin to jury nullification and reflect the "American tradition of localized, populist control of criminal law."[218] The use of blanket DPs, he argues, "facilitates wholesale the species of democratic local control that jury nullification permits retail."[219] In the same vein, some scholars argue that there is little meaningful distinction between the use of blanket DPs and case-by-case discretion.[220] Other scholars favor blanket DPs because they believe that directing

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214. FAIR & JUST PROSECUTION *supra* note 184; Memorandum from Larry Krasner, *supra* note 200, at 4 (describing the actual cost to Philadelphia County of incarcerating an individual as between $42,000 and $60,000 a year).

215. *See* Burdette & Carruthers, *supra* note 183, at 187.

216. *See* VICTORIA M. SMIEGOCKI ET AL., DALL. PROJECT, FEWER, NOT FAIRER: CHANGES IN RACIAL DISPARITY, POLICE REFERRALS FOR MARIJUANA PROSECUTION IN DALLAS COUNTY 2018–2019, at 2 (2021), https://scholar.smu.edu/cgi/viewcontent.cgi?article=1006&context=deasoncenter [https://perma.cc/F8QD-J7XH] (discussing Dallas County DA John Creuzot's hope that decreasing prosecution of marijuana policies would decrease racial disparities, but showing that racial disparities remained despite decrease in prosecutions); Warren v. DeSantis, 653 F. Supp. 3d 1118, 1127 (N.D. Fla. 2023) (explaining Warren's rationale that certain "stops disproportionately burdened Black citizens and could undermine public trust"), *vacated and remanded*, 90 F.4th 1115 (11th Cir. 2024).

217. FAIR & JUST PROSECUTION, *supra* note 184; *see supra* Section III.B.

218. W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 180 (2021).

219. *Id.*

220. *See* Hessick, *supra* note 169, at 974 (noting that progressive prosecutors have contributed to "the impression that their declination of charges is somehow radical or unique," when in reality "prosecutors have long declined to bring charges even when they possessed enough evidence to indict or convict"); Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS (Apr. 23, 2020), https://www.americanprogress.org/wp-content/uploads/sites/2/2020/04/04-23_Progressive-Prosecutors.pdf [https://perma.cc/S4HQ-T5YW] (arguing that blanket declination polices are "simply a different application of the standard discretion afforded to prosecutors to decide which cases they will pursue"); Davis, *supra* note 170, at 4–5.

prosecutorial discretion toward reformist goals will work faster or better than legislative change.[221]

Proponents of blanket DPs also emphasize that prosecutors are popularly elected in most of the country, so voters have a chance to weigh in on their policies.[222] Some scholars also argue that blanket policies better lend themselves to public disclosure, which in turn increases prosecutors' transparency.[223] In this way, blanket DPs formally establish, streamline, and disclose the trade-offs that prosecutors typically make case-by-case, behind the scenes.[224]

Blanket DPs are useful for several reasons.[225] But as the Supreme Court explained in *INS v. Chadha*, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it" if it runs contrary to constitutional principles.[226] Many scholars think that blanket DPs violate the separation of powers because they allow prosecutors to "veto" entire categories of offenses created by the legislature.[227] Sometimes, prosecutors enacting nonprosecution

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221. Burdette & Carruthers, *supra* note 183, at 180 ("The blanket policies offer an opportunity for reform advocates to avoid 'dysfunctional' legislatures and to instead implement reforms by attending to individual District and Prosecuting Attorneys.").

222. *Id.* at 191 (quoting Murray, *supra* note 218, at 173); Barkow, *supra* note 84, at 540 (noting that prosecutors are usually elected). *But see* Sklansky, *supra* note 213, at 276 ("The relationship between prosecutors and democracy is shrouded in confusion, far more so than the relationship between police and democracy.").

223. *See* Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 633–34 (2020); Dripps, *supra* note 121, at 1174–76 ("People have a right to know the law, and if the real law is made by prosecutors, then people have a right to know which criminal statutes the legislature has authorized prosecutors to nullify."). *See generally* MANHATTAN DIST. ATT'Y'S OFF., REDUCING THE CRIMINAL JUSTICE FOOTPRINT IN MANHATTAN (2021), https://manhattanda.org/wp-content/uploads/2021/10/Declination-Policies-Brief.pdf [https://perma.cc/RUK5-69A8] (outlining office's declination policies and providing data on reductions in prosecution).

224. *See* Sawyer, *supra* note 223, at 633–34; *see also* Dripps, *supra* note 121, at 1176 ("The objection that public and enforceable criteria for the exercise of prosecutorial discretion would enable violation of some laws seems to me a strong point in favor of such an approach."); Davis, *supra* note 190, at 209–10.

225. *See supra* notes 218–24 and accompanying text.

226. I.N.S. v. Chadha, 462 U.S. 919, 944 (1983); *see also* Burdette & Carruthers, *supra* note 183, at 193 (arguing that even if blanket DPs increase transparency, separation of powers concerns generated by blanket DPs remain).

227. *See* Hessick & Su, *supra* note 7, at 1680; Price, *supra* note 161, at 671 (arguing that categorical non-enforcement "effectively supplant[s] the legislature's primary role in establishing conduct rules"); Burdette & Carruthers, *supra* note 183, at 193 (calling blanket DPs "half-baked measures that obscure the rule of law and blur the boundaries between the executive and the legislature"); Ayala v. Scott, 224 So. 3d 755, 758 (Fla. 2017) (describing a blanket policy as "tantamount to a functional veto of state law").

policies have acknowledged that they may be flouting the will of lawmakers.[228] For example, a letter signed by eighty-four prosecutors who promised not to prosecute abortion offenses stated: "Our legislatures may decide to criminalize personal healthcare decisions, but we remain obligated to prosecute only those cases that serve the interests of justice and the people."[229] Blanket DPs may look like lawmaking rather than law enforcement, especially when the policy disavows the use of discretion.[230]

Beyond separation of powers concerns, others have noted that blanket DPs concentrate too much power in individuals, which undermines the rule of law and eschews valuable community input.[231] Because blanket DPs are created under less public scrutiny than legislation, some scholars argue that blanket DPs more readily lend themselves to pretext.[232] Others respond that the focus on prosecutorial discretion, rather than legislative changes, is misguided.[233]

### *D. Courts Dislike Blanket DPs*

Cognizant of these concerns, courts have often criticized blanket DPs, viewing them as a failure to exercise prosecutorial discretion.[234] Although prosecutors' decisions are generally unreviewable,[235] courts have subjected

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228. FAIR & JUST PROSECUTION, *supra* note 184.

229. *Id.*

230. *See supra* Section III.D. *But see* Sklansky, *supra* note 160, at 513 (arguing that prosecutors "legislate criminal law" to some degree by "'setting the penal code's effective scope' through their collective exercise of discretion"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) ("[P]rosecutors . . . are the criminal justice system's real lawmakers.").

231. Burdette & Carruthers, *supra* note 183, at 189–90; *see also* Price, *supra* note 161, at 671–72 (categorizing case-by-case nonenforcement as a "lesser power" than blanket nonenforcement); Sklansky, *supra* note 160, at 481 ("The concentration of power in the hands of prosecutors has been called the 'overriding evil' of American criminal justice . . . ." (quoting Donald A. Dripps, *Reinventing Plea Bargaining*, *in* THE FUTURE OF CRIMINAL LAW 55, 60 (Michelle Madden Dempsey et al. eds., 2014))).

232. Burdette & Carruthers, *supra* note 183, at 202; Richman & Stuntz, *supra* note 159, at 583.

233. *See* Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 713 (2020) ("[P]rosecutors cannot be the source of abolition. . . . [A]bolition would have to come from those who create the system—currently judges and legislators—not those who work within it."); *see also* Udi Ofer, *Defunding Prosecutions and Reinvesting in Communities: The Case for Reducing the Power and Budgets of Prosecutors to Help End Mass Incarceration*, 2 HASTINGS J. CRIME & PUNISHMENT 31, 31 (2021).

234. *See, e.g.*, Warren v. DeSantis, 653 F. Supp. 3d 1118, 1127 (N.D. Fla. 2023), *vacated and remanded*, 90 F.4th 1115 (11th Cir. 2024).

235. Wright, *supra* note 161, at 825; *see also* Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review.").

prosecutors to greater scrutiny when it seems like prosecutors have departed from making case-by-case determinations.[236]

For example, several courts have rejected prosecutors' blanket refusals to seek the death penalty.[237] In *Johnson v. Pataki*, the New York Governor intervened when a local prosecutor stated that he would not enforce the death penalty in any case.[238] The New York Court of Appeals held that this was a neglect of prosecutorial duty.[239] Rather than making a categorical decision, the prosecutor was required to exercise his discretion in each case to determine whether the death penalty would be appropriate.[240] One scholar predicted that "a scenario similar to New York's Pataki-Johnson dispute could easily arise in other states,"[241] and it has. At a press conference in 2017, Florida State Attorney Aramis Ayala announced that she would never pursue the death penalty, even in a case that "absolutely deserve[s] [the] death penalty."[242] In response, Florida Governor Rick Scott issued an executive order reassigning Ayala's death-penalty-eligible cases to another attorney.[243] In *Ayala v. Scott*, the Florida Supreme Court reasoned that Ayala's blanket prohibition of the death penalty "does not reflect an exercise of prosecutorial discretion" and upheld the governor's choice to reassign Ayala's cases.[244]

Post-*Roe*, prosecutors have announced blanket DPs related to abortion.[245] This has generated backlash from state officials, as evidenced by the high-profile case *Warren v. DeSantis*.[246] In 2022, Florida Governor Ron DeSantis suspended State Attorney Andrew Warren after he signed two statements pledging not to prosecute certain offenses related to reproductive health and transgender youth.[247] Warren also had other presumptive nonprosecution

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236. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985) (stating that, while agency decisions not to prosecute are generally not reviewable by courts, the Court would not opine on a scenario where "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities"); Ass'n of Deputy Dist. Att'ys for L.A. Cnty. v. Gascón, 295 Cal. Rptr. 3d 1, 11 (Ct. App. 2022) (finding that Gascón's blanket DP was reviewable).

237. *See, e.g.*, Ayala v. Scott, 224 So. 3d 755 (Fla. 2017); Johnson v. Pataki, 691 N.E.2d 1002 (N.Y. 1997).

238. *Pataki*, 691 N.E.2d at 1007.

239. *See id.*

240. *Id.*

241. Horowitz, *supra* note 185, at 2572.

242. *Ayala*, 224 So. 3d at 756–57.

243. *Id.* at 757.

244. *Id.* at 759.

245. *See* FAIR & JUST PROSECUTION, *supra* note 184.

246. 90 F.4th 1115 (11th Cir. 2024).

247. *Id.* at 1121; Gedeon, *supra* note 3; *see also* FAIR & JUST PROSECUTION, *supra* note 184.

policies in place in his office.[248] Despite these policies, the District Court found that Warren's staff continued to exercise discretion case-by-case and did not engage in blanket nonprosecution.[249] The Eleventh Circuit agreed, noting that "DeSantis could not have reasonably believed" that "Warren established blanket nonprosecution policies sufficient to constitute neglect of duty or incompetence."[250] Even though Warren was ultimately found to be exercising case-by-case discretion, the *Warren v. DeSantis* litigation demonstrates that blanket DPs make state officials and courts uneasy.

Courts are wary of blanket DPs, but they have been willing to uphold declination policies framed as a rebuttable presumption.[251] Presumptive nonprosecution policies establish a general office practice not to prosecute a certain offense while emphasizing that prosecutors retain discretion to bring charges if the particular incident merits doing so.[252] Rebuttable presumptions therefore allow prosecutors to create policies that establish how they will allocate limited resources without stepping into "lawmaking" territory.[253]

The distinction between complete blanket DPs and presumptive nonprosecution policies explains the different outcomes in *Ayala* and *Warren*. In *Warren*, the Eleventh Circuit was not troubled by Warren's use of declination policies because he urged his staff to use case-by-case discretion.[254] In *Ayala*, however, the Florida Supreme Court emphasized that Ayala promised to avoid the death penalty "even where an individual case 'absolutely deserves the death penalty.'"[255] The maintenance of some discretion seems to satisfy courts that prosecutors have fulfilled their duty to enforce the law.[256]

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248. *Warren*, 90 F.4th at 1119–20.

249. Warren v. DeSantis, 653 F. Supp. 3d 1118, 1123–25 (N.D. Fla. 2023), *vacated and remanded*, 90 F.4th 1115, 1119–20 (11th Cir. 2024).

250. *Warren*, 90 F.4th at 1138.

251. *See id.* at 1120 ("Although the policies created presumptions, they specified that a case's circumstances could overcome those presumptions.").

252. Wright, *supra* note 161, at 827; *see, e.g.*, *Warren*, 90 F.4th at 1120–24 (permitting Warren's "Bike Policy," which presumed that the office would not prosecute noncriminal bike and pedestrian violations unless a particular violation raised public safety concerns).

253. Wright, *supra* note 161, at 823 ("Local prosecutors can meet their obligations to the statewide polity by framing their policies as rebuttable presumptions against filing charges and by justifying those policies as a reallocation of limited resources.").

254. *Warren*, 90 F.4th at 1120–24.

255. Ayala v. Scott, 224 So. 3d 755, 756–57 (Fla. 2017).

256. *Compare id.* (emphasizing that Florida State Attorney Ayala promised to avoid the death penalty even in cases where it was legally warranted), *with Warren*, 90 F.4th at 1120–24 (finding Florida State Attorney Warren's use of DPs acceptable because he urged his staff to use case-by-case discretion).

Despite courts' discomfort with blanket DPs, they continue to proliferate.[257] With a deeper understanding of blanket DPs and supersession, this Comment now returns to the Hobbs-Mayes Policy and explores the unique way that it combines these two legal mechanisms.

## IV. HOBBS-MAYES POLICY REVISITED: PROGRESSIVE SUPERSESSION

The Hobbs-Mayes Policy sounds in progressive prosecution, though neither Hobbs nor Mayes has labeled it as such. The Policy aligns with left-leaning politics, and it circumscribes the reach of criminal law.[258] Critiques of the Policy also mirror critiques of progressive prosecution, which argue that a prosecutor acts outside of her authority when she declines to pursue charges that could otherwise be brought.[259]

The Hobbs-Mayes Policy creates the functional equivalent of a blanket DP at the statewide level. Invoking her supersession power under A.R.S. § 41-193(A)(5), Governor Hobbs directed AG Mayes to "assume all duties" regarding abortion-related prosecutions.[260] AG Mayes then announced that she would decline to prosecute certain abortion-related offenses.[261] This Comment argues that the Hobbs-Mayes Policy represents a new prosecutorial strategy, called "progressive supersession." This Part describes this innovation, examines whether it is a positive development, and evaluates what circumstances might make it most appropriate.

### *A. Not Your Average Supersession Action*

The Hobbs-Mayes Policy is unlike supersession actions initiated in other states. Usually, state officials use supersession to push back against local progressive prosecutors.[262] As seen in *Pataki*, *Ayala*, and *Warren*, supersession has often been used by a more conservative state official to compel a progressive local prosecutor to enforce categories of laws they have declined to prosecute.[263] In *Pataki* and *Ayala*, governors invoked supersession power to mandate that local prosecutors seek the death penalty when it was

257. *See supra* Section III.B.
258. *See supra* Section III.A.
259. *See supra* Sections I.B, III.C.
260. *See* Ariz. Exec. Order No. 2023-11, at 2 (June 22, 2023).
261. *See* Press Release, Ariz. Att'y Gen. Kris Mayes, *supra* note 17.
262. CAMACHO ET AL., *supra* note 7, at 10.
263. *See supra* Section III.C.

merited by law.[264] In *Warren*, DeSantis terminated Warren's employment because he signed a statement that he would not enforce statutes that criminalized abortion or penalized transgender people.[265]

The Hobbs-Mayes Policy subverts this common understanding of supersession. First, the Policy was promulgated by a Democratic administration, rather than a Republican one. Instead of using supersession to combat progressive prosecutors, the Hobbs Administration used supersession to create a blanket DP that promotes a left-leaning goal: preventing criminalization of abortion. Second, the Policy differs from "regular" supersession because it seeks to *prevent* local prosecutors from bringing charges, whereas a typical supersession action seeks to *compel* local prosecutors to bring charges. In this way, the Hobbs-Mayes Policy is a "double inversion" of a typical supersession action. It promotes a progressive goal rather than a conservative one, and it prevents enforcement of criminal laws rather than encouraging it.

This inversion of partisan alignment and prosecutorial purpose makes the Hobbs-Mayes Policy a unique example of supersession—potentially the first attempt at "progressive supersession" in the nation. Progressive supersession may sound like an oxymoron, but the Hobbs-Mayes Policy challenges the notion that supersession bills or actions are inherently anti-reformist. Instead, the Policy demonstrates that, just like local prosecutorial discretion, supersession is a tool that can be used by progressives and conservatives alike.[266]

### *B. Normative Arguments*

If blanket DPs are disfavored at the local level, it is worth questioning whether a state prosecutor should be allowed to use supersession power to create one. Progressive supersession implicates several public policy considerations unique to the statewide context, such as transparency, consistent application of law, electoral accountability, and legality.

#### 1. Transparency, Consistency, and Uniformity

Many of the benefits of statewide blanket DPs mirror the benefits of local blanket DPs, but the beneficial effects are amplified because of the greater

264. *See supra* notes 237–44 and accompanying text.
265. *See supra* notes 245–50 and accompanying text.
266. *See* Wright, *supra* note 161, at 832–33.

jurisdiction covered. First, a statewide blanket DP like the Hobbs-Mayes Policy provides citizens with a clear declaration of what the law is statewide.[267] When state prosecutors publicly share their decision-making strategies, it increases transparency.[268] Moreover, statewide blanket DPs would not implicate the same secrecy concerns generated by local declination policies.[269] A policy like the Hobbs-Mayes Policy that is publicly announced by the Governor and AG, posted online, and covered by statewide news outlets has a better chance of reaching citizens than an internal policy in a local prosecutor's office.[270] With greater access to information about prosecutorial decision-making, voters can make more informed decisions when deciding to re-elect state officials. A statewide blanket DP may therefore provide greater clarity and transparency than a local policy.

The greatest benefit of a statewide blanket DP is its ability to promote uniform, consistent enforcement of laws across the state.[271] This makes a statewide blanket DP more useful than a local blanket DP, because it ensures uniformity beyond one city or county.[272] This wide reach decreases the chance that people across a county line from one another will be prosecuted differently.[273] Governor Hobbs emphasized these concerns in her EO, explaining that centralizing abortion-related prosecutions in the AG's office "will provide uniformity and ensure equal and consistent application of the law across the State."[274] A supersession action like the Hobbs-Mayes Policy

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267. *See* Wright, *supra* note 161, at 827–28 ("[A] clear announcement of [declination policies] promotes better accountability of the prosecutor to the public.").

268. *See supra* notes 221–24 and accompanying text.

269. *Id.*; *see also* Ouziel, *supra* note 180, at 1102 (criticizing the lack of available data regarding blanket DPs, which makes it impossible to assess whether prosecutors are exercising charging discretion in the way they pledged); Price, *supra* note 161, at 671 ("Indeed, even if prosecutors chose to make public their priorities and their rationales for particular declination decisions, they might do so retrospectively by providing explanations for past decisions without guaranteeing anything for the future.").

270. Ouziel, *supra* note 180, at 1099 n.104 ("[M]ost declinations are secret. Public visibility into declinations is a *prerequisite* to an effective electoral or federalism-based oversight strategy.").

271. Yeargain, *supra* note 85, at 115; *see also supra* Section II.B (discussing how Model #1 supersession statutes elevate uniformity above local control).

272. Hessick & Su, *supra* note 7, at 1700 (discussing how state-level control by one political party can mask heterogeneous politics within a state).

273. *See* Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, MARSHALL PROJECT (Feb. 3, 2022, 6:00 AM), https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers [https://perma.cc/J7WF-9D9S] (describing how being arrested and charged one county over could drastically affect the final sentence, depending on the priorities and policies of the county prosecutors).

274. Ariz. Exec. Order No. 2023-11, at 2 (June 22, 2023).

can create consistency immediately, without the wait to reach legislative or judicial consensus.[275] This speed may be especially desirable for novel areas of criminality like abortion, where legal rights have shifted and citizens may need guidance about what conduct is permissible.

### 2. Volatility, Accountability, & Responsiveness

The benefits of a statewide blanket DP are amplified due to its larger jurisdiction, but so are its drawbacks. The most troubling aspect of a statewide blanket DP may be that, for it to "work" in progressive prosecutors' favor, the "right" people need to be elected. If the Arizona AG can promulgate policies for the whole state whenever she deems it "necessary,"[276] the stakes of AG elections are heightened.[277] Although local prosecutorial elections have become more contested in the last decade,[278] they are still more insulated from partisan politics than a statewide election, especially in a swing state like Arizona.[279] Vesting charging decisions in local prosecutors risks unequal application of the law between counties, but this lack of uniformity may be preferable to partisan swings between gubernatorial administrations.[280] Under broad supersession statutes, "the election of a new attorney general with an entirely different ideology and prosecutorial outlook could result in a vastly different regime for state-level prosecutions."[281] This might mean that "hundreds of counties nationwide elect local prosecutors whose decisions can be reversed and altered at the whim of the state attorney general."[282]

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275. *See* Levitt, *supra* note 55; Burdette & Carruthers, *supra* note 183, at 180.

276. *See* ARIZ. REV. STAT. ANN. § 41-193(A)(5) (2021); *see also supra* Section II.B.

277. *See* Barkow, *supra* note 84, at 540 (arguing that "shifting policy as actors change with elections would create too much destabilization" and that state legislatures therefore would be less likely to grant power to an AG based on party affiliation at any given moment); Yeargain, *supra* note 85, at 129 ("Increasing prosecutors' dependence on political actors would subject them to the political whims of whichever state officials are in power at any given time and would detract from their sworn duty to independently pursue justice."); Burdette & Carruthers, *supra* note 183, at 189 ("[B]lanket DPs turn the enforcement of the law into an even more partisan endeavor with no inherent limit.").

278. *See* Green & Roiphe, *supra* note 186 and accompanying text.

279. *See* Nathaniel Rakich, *How Arizona Became a Swing State*, FIVETHIRTYEIGHT (June 29, 2020, 7:33 AM), https://fivethirtyeight.com/features/how-arizona-became-a-swing-state [https://perma.cc/9RBP-TYFE].

280. *See* Dennis, *supra* note 89, at 157 (noting that supersession increases "potential for abuse, especially in politically controversial situations").

281. Yeargain, *supra* note 85, at 116.

282. *Id.* at 115–16.

In addition to volatility concerns, supersession disrupts local control of criminal law and prosecutorial elections.[283] Many feel that "[l]ocal prosecutors are better-acquainted with the facts and attendant circumstances of individual cases brought by their offices than the state officials statutorily empowered to supersede them."[284] While smaller states like Rhode Island may benefit from state centralization, supersession could make less sense in geographically larger or more politically diverse states.[285] Vesting charging decisions in local prosecutors ensures that prosecution is customized to the public safety priorities of local voters.[286]

Moreover, forty-six American states elect local prosecutors.[287] Presumably, states hold these local elections because they believe that local prosecutors should be accountable and responsive to people in their immediate community.[288] Supersession disrupts this dynamic, allowing the AG to strip charging decisions from "hundreds of counties nationwide [that] elect local prosecutors."[289] Arizona county attorneys cited this concern in their letter opposing the Hobbs-Mayes Policy, stating that it is "an unnecessary and unjustified impingement" on their authority.[290] Additionally, supersession by state actors creates electoral accountability concerns.[291] If a voter is unhappy with criminal law enforcement in their area, will they know who to vote out of office? Supersession may provide clarity and uniform enforcement, but it also muddles traditional understandings of who enforces the law and how voters can influence the policies promulgated.

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283. *See* Murray, *supra* note 218, at 173; Wright, *supra* note 161, at 826 (noting the "importance of diverse structures and practices among different prosecutors' offices").

284. Yeargain, *supra* note 85, at 127; *see also* JOAN JACOBY, THE AMERICAN PROSECUTOR 38 (1980) (describing a local prosecutor as a "local represent[ative] applying local standards to the enforcement of essentially local laws").

285. Yeargain, *supra* note 85, at 115–16.

286. Wright, *supra* note 161, at 827; Gold, *supra* note 161, at 876.

287. Yeargain, *supra* note 85, at 129; Barkow, *supra* note 84, at 540.

288. Yeargain, *supra* note 85, at 133; *see also* Wright, *supra* note 161, at 827 (noting that voters in a district should influence local prosecutor's priorities and that popular support for non-enforcement of criminal laws "adds greater legitimacy to the prosecutor's declination policy").

289. Yeargain, *supra* note 85, at 115–16; *see also* Complaint at 3, Warren v. DeSantis, 653 F. Supp. 3d 1118 (N.D. Fla. 2023) (No. 22cv302), 2022 WL 3566587 (arguing that Governor DeSantis "subvert[ed] the will of the voters" by firing State Attorney Andrew Warren).

290. Letter to Katie Hobbs, *supra* note 57; *see also supra* Section I.B.

291. *See* Michael J. Nelson & Taran Samarth, *Judging Prosecutors: Public Support for Prosecutorial Discretion*, RSCH. & POL. (Nov. 21, 2022), https://journals.sagepub.com/doi/epdf/10.1177/20531680221134999 [https://perma.cc/VQN7-2R6M].

3. Legal Challenges

Progressive supersession also raises several unsettled legal questions regarding statutory construction and the separation of powers. Courts have upheld "traditional" uses of supersession that, in individual suits, compel local prosecutors to bring charges.[292] Courts have also upheld supersession when it is used to challenge local blanket DPs.[293] It is unclear how courts may evaluate supersession and blanket DPs when used together.

This Comment does not evaluate the legality of progressive supersession wholesale. The viability of a specific statewide blanket DP depends on a state's constitutional structure, the language of the supersession statute, the prosecutor's proposed declination policy, and the factual circumstances surrounding the policy. Regardless, a state official evaluating whether to use supersession to promulgate a blanket DP should be aware that they may face legal challenges, and related costs on state coffers, for doing so.

First, statewide blanket DPs require more complex legal analysis than a local blanket DP. Courts will need to evaluate not only the blanket DP itself but also whether the AG properly superseded the local prosecutor under the state constitution and statutes.[294] The variety among state statutes defining supersession and prosecutorial duties further complicates the analysis. Because state statutes regarding supersession and prosecutor duties vary, principles developed by one state may not easily transfer to another.[295]

Second, statewide blanket DPs could violate state constitutions. They might disrupt how a state constitution has allocated power between state and local prosecutors, within the state's executive branch, or among the different branches of state government.[296] No matter how broad a supersession statute is, it almost certainly cannot transform an AG from law-enforcer to

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292. *See supra* Section III.D.

293. *See supra* Section III.D.

294. *See* Schutsky, *supra* note 75 ("We did thorough research and I am very, very confident in the legal ground that we stand on in this executive order.").

295. *See supra* Section II.B; *see also* Price, *supra* note 161, at 652 (arguing that varied state laws establishing enforcement discretion and autonomy granted to local prosecutors—"and not generalized abstractions about the rule of law, criminal justice policy, the proper prosecutorial function, or even the proper degree of local policy-making autonomy—should govern whether categorical nonenforcement is lawful in a particular jurisdiction").

296. *See supra* Section III.C; *see also* Wright, *supra* note 161, at 823.

lawmaker.[297] To avoid the appearance of lawmaking, AGs might consider framing a statewide blanket DP as a rebuttable presumption.[298]

Third, even if a statewide blanket DP does not violate a state's constitution, it might exceed the bounds of the state's supersession statute. For example, in Arizona, courts would have to evaluate whether the Governor acted within her statutory authority when she directed the AG to intervene or whether the AG's intervention was "necessary."[299] The word "assist" might also limit the AG's authority to enforce declination policies over local prosecutors' objections.[300] Courts would have to develop standards for these inquiries that do not exist at present.[301]

### *C. Progressive Supersession at Its Best*

For better or for worse, progressive supersession amplifies the benefits and detriments of local blanket DPs. While policy arguments may cut both ways, the context surrounding the Hobbs-Mayes Policy demonstrates that progressive supersession is most appropriate under certain circumstances.

First, progressive supersession may be most appropriate when there is conflict or ambiguity in the law. Confusion about the governing law may lead county prosecutors to different interpretations, which in turn may lead to different charging practices in neighboring counties. In this scenario, a blanket DP can provide much-needed stability. Governor Hobbs noted the lack of stability in Arizona abortion law as a reason to initiate her supersession action.[302] By preserving the *Roe* status quo during this time, the Hobbs-Mayes Policy bought the judicial and legislative branches time to interpret and develop Arizona's abortion statutes.

Second, progressive supersession may be most appropriate when a novel area of the law—like abortion criminality—is implicated. In this scenario, some of the negative aspects of supersession are less salient. Local

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297. 1 WILLIAM BLACKSTONE, COMMENTARIES *142 (stating that when "the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men . . . there can be no public liberty"). *But see* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 671 (2014) ("Congress also may expand the scope of executive enforcement discretion by authorizing broader nonenforcement.").

298. *See supra* Section III.C.

299. *See supra* Section II.B.

300. *See supra* Section II.C.

301. *See supra* Part II (noting that supersession has rarely been litigated in Arizona or other states).

302. *See supra* Section I.A; *see also* Isaacson v. Brnovich, 610 F. Supp. 3d 1243, 1249–50 (D. Ariz. 2022) (discussing the vagueness concerns present in Arizona abortion laws).

prosecutors are not operating in an area where they have traditional expertise, and they might be more amenable to guidance from a state-level official.[303] Supersession would also be more efficient than allowing local prosecutors to slowly develop their own policies and precedents through case-by-case discretion. Using progressive supersession to centralize a policy choice allows state executives to provide a consistent framework while judges and legislators fine-tune a new law. By announcing a clear rule during an uncertain time, the Hobbs-Mayes Policy helped ease the transition from *Roe* to a state-specific regime of abortion rights.

Third, progressive supersession may be most appropriate when the stakes for citizens are high, such as in criminal law or another area where significant private rights are at stake.[304] Unclear abortion laws implicate significant privacy and liberty interests, making a blanket DP especially appropriate to prevent undue hardship to citizens.[305] Restricting supersession to scenarios where stakes are high also respects comity between state and local officials.[306] It leaves local prosecutors to manage their own affairs unless there is a strong countervailing public interest.[307]

The Hobbs-Mayes Policy, then, is supersession at its best. Supersession is best used to provide uniformity when uniformity is sorely needed, and the Policy did just that: it provided state-wide consistency in a time of legal tumult when significant individual rights were at stake. By proscribing abortion-related prosecutions, the Policy protected citizens' expectations, prevented disparate prosecution practices across the state, and conserved prosecutorial resources. Progressive supersession served as an efficient stop-gap measure amidst legal and political uncertainty.

Subsequent clarification of abortion laws has made the Hobbs-Mayes Policy less load-bearing. The Arizona Legislature decriminalized many abortions by repealing the 1864 near-total ban, and voters further protected abortion access by amending the Arizona Constitution.[308] There is therefore less need for the Policy, which limits prosecution of abortion-related offenses. No one has formally challenged the Policy to date, and in light of these recent changes in abortion laws, it seems unlikely that anyone will.

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303. *See supra* Section II.A.

304. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (weighing the risk of an "erroneous deprivation" of a private interest).

305. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 512 (1961) (Douglas, J., dissenting) (noting, in the context of laws criminalizing contraceptives, that "an arbitrary administrative pattern of non-enforcement may increase the hardships of those subject to the law").

306. *See supra* notes 108–11, 128–29 and accompanying text.

307. *See supra* notes 108–11, 128–29 and accompanying text.

308. *See supra* Section I.C.

Although it is proper that abortion laws were addressed through the political process, this has left some difficult legal questions about supersession unanswered. Consider, for example, what would have happened if the Arizona Legislature had not repealed the 1864 abortion law and voters had not approved a state constitutional right to abortion. The Arizona Supreme Court declared that the 1864 law controlled,[309] but AG Mayes announced that she would not, under any circumstances, enforce "this draconian law" against any woman or doctor in Arizona.[310] This is the precise kind of defiant, categorical statement that landed Florida State Attorney Ayala in trouble.[311] Because the Arizona Legislature repealed the 1864 law, a direct interbranch conflict did not last long. Under different circumstances, however, a statewide blanket DP may generate longer-lasting separation of powers concerns.[312]

Beyond abortion law, the Hobbs-Mayes Policy sets a broad precedent for the use of state prosecutorial power. Supporters of Hobbs and Mayes may be pleased with how efficiently the Policy promoted progressive goals without requiring legislative or judicial consensus. But supporters might find themselves unhappy with the Policy's precedent if future administrations use supersession to implement different criminal justice policies.[313] Future proponents of progressive supersession would be wise to apply this tool in circumstances like those surrounding the Hobbs-Mayes Policy: when there is conflict or ambiguity in the law; when a new area of criminality is implicated; and when the stakes are high for citizens.

## V. CONCLUSION

The Hobbs-Mayes Policy will likely not be around for long. Arizona has swiftly and steadily clarified its abortion laws through litigation, legislation, and ballot measures.[314] Although the Hobbs-Mayes Policy may not be

309. Planned Parenthood Ariz., Inc. v. Mayes, 545 P.3d 892, 903 (Ariz. 2024).

310. Press Release, Ariz. Att'y Gen., *supra* note 52.

311. *See supra* notes 242–44 and accompanying text.

312. *See supra* Sections III.C, IV.B.3.

313. *See* Blakinger, *supra* note 273 (noting that prosecutorial discretion is "the same tool" that is "being used by a different set of people with a different set of goals"); *see also* Wright, *supra* note 161, at 832–33; *see also* Arthur D. Hellman, *The Supreme Court's Two Constitutions: A First Look at the "Reverse Polarity" Cases*, 82 U. PITT. L. REV. 273, 273–74 (2020) (discussing "reverse polarity" theory and explaining how traditional characterizations of liberal-conservative constitutional values may reverse themselves over time).

314. *See supra* Part I; *see also supra* notes 79–81 and accompanying text.

permanent, its impact on supersession, progressive prosecution trends, and the balance between state and local power will outlive its practical use.

First, the Policy offers a creative solution for handling abortion-related prosecutions post-*Roe*. Supersession actions may allow state executive officers to centralize abortion-related prosecution at the state level, depending on what state statutes allow. This gives state legislatures and courts time to define the scope of state abortion rights, without subjecting citizens to unequal or unnecessary prosecution in the meantime. While there may be normative reasons to disapprove of the Policy, it has thus far carried on without legal challenge. Other states with unclear abortion regulations may look to the Hobbs-Mayes Policy as an example of how to ease the transition from the federal constitutional right to abortion under *Roe* to the state-specific regime under *Dobbs*.

Beyond the abortion context, the Hobbs-Mayes Policy demonstrates the expansiveness of supersession power. While criminal justice reformers have feared supersession for this reason, the Policy shows that supersession can be reimagined as a tool to achieve progressive prosecution goals. Those wishing to promote progressive policies at the state level may look to Arizona as a model. Those against broad uses of executive power, of progressive or conservative bent, may look to Arizona as a warning sign.

On a more academic level, the Hobbs-Mayes Policy serves as a notable innovation in prosecutorial discretion. Prosecutorial discretion is hard to define and hard to rein in, but this murkiness also allows prosecutors to adapt to the needs of the moment. If prosecutors' mandate is to ensure that "justice shall be done,"[315] innovations like the Hobbs-Mayes Policy should be commended as an attempt to "do justice" in a changing landscape.

Many stars must align for a progressive supersession policy like the Hobbs-Mayes Policy to be successful. State executive officers must share enforcement priorities. The state must have a broad supersession statute. Conditions that make supersession beneficial, such as unclear or novel laws, must be present. If these criteria are met, though, progressive supersession might provide an efficient, meaningful solution in an uncertain legal moment. Time will tell whether Arizona's progressive supersession experiment will be an aberration or a lasting innovation.

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315. Berger v. United States, 295 U.S. 78, 88 (1935).